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5 Abb. N. C. 72—REVERSED, 74 N. Y. 495.

5 Abb. N. C. 137—AFFIRMED, 17 Hun 204.

5 Abb. N. C. 286—EXPLAINED, 60 How. 489.

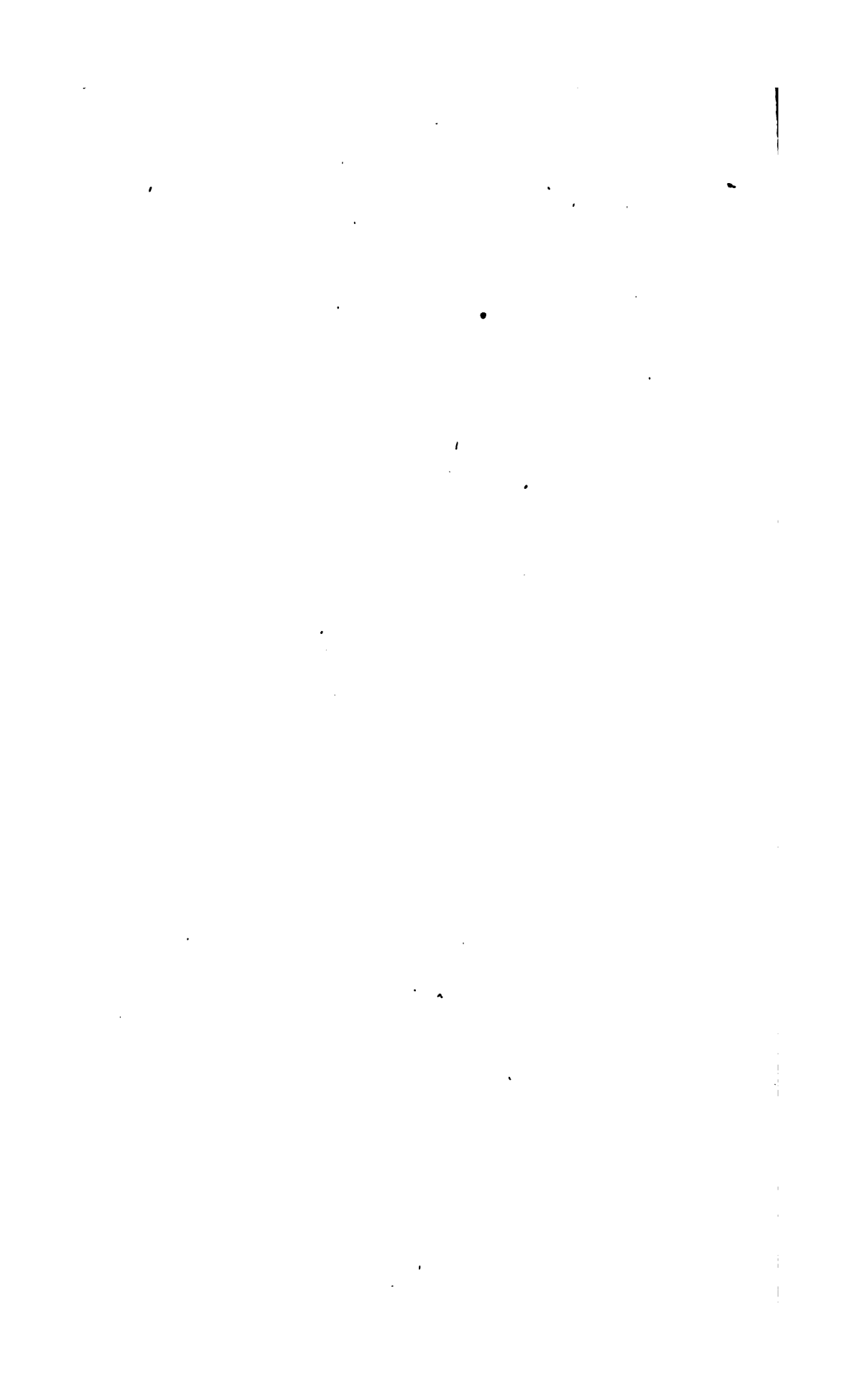
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NEW CASES

SELECTED CHIEFLY

FROM

DECISIONS OF THE COURTS

OF THE

STATE OF NEW YORK.

WITH NOTES

By AUSTIN ABBOTT.

WITH AN ANALYTICAL INDEX TO ALL POINTS OF
LAW AND PRACTICE

CONTAINED IN

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CATION BY INCREASING.

A board of commissioners created for the construction of a public work, and charged with the duty of contracting therefor, need not call for bids or proposal with a view to public competition unless expressly required to do so.*

Hence, if they invite proposals when not required to do so, they may nevertheless, before signing a contract, alter the specifications furnished to the successful bidder, there being no fraud.†

* See note at the end of the case.

† Officers receiving proposals may accept the lowest bid though it departs from the terms of offer in respect to the time for executing the contract. 10 *Op. Att.-Gen.* 140.

Where the law requires public proposals, a provision, not contained in the advertisement, but inserted in the contract made, that the contract might be extended by mutual agreement, is not valid, against the government, and after making such an extension the government may revoke it. 13 *Op. Att.-Gen.* 174.

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Under a statute making it the duty of a board of officers to contract for the execution of a public work, according to a plan adopted by the city, "provided the whole expense thereof shall not exceed" a specified sum, with a provision for the issue of city bonds to raise the money,—a contract for doing the whole work for a sum not in excess of that amount is valid, although it reserves power to the city to make changes in detail which may be found necessary in carrying out the work.*

The word "plan," in such an act for constructing a very extensive reservoir,—*Held*, in view of the nature of the work, to relate to the generic character of the work as a storage reservoir, and not to preclude changes in the details of work and materials. *So held*, where the legislature, after such changes had been made, granted authority to take additional land to enlarge the area.†

In an authorized express contract by a municipal corporation, a reser-

* A statute authorized a city to construct a work, and provided for the appointment of commissioners to execute it, and declared that "for the purpose of defraying the cost . . . and paying all expenses incident thereto, the city council shall have authority to issue scrip, &c., to an amount not exceeding in the whole the sum of \$500,000.00. *Held*, that there was no limitation of the cost, and the city had implied power to expend sufficient to complete the work in a reasonable and proper manner. *Foot v. City of Salem*, 14 *Allen*, 87.

The apparent conflict of opinion as to the validity of municipal contracts in excess of appropriation nearly disappears when the authorities are considered with reference to the nature and substance of the statute on which the question arises. The following authorities will afford a convenient clue to the subject, in addition to those cited by counsel.

Opinion of Att.-Gen. CUSHING in the Capitol Extension case, 6 *Op. Att.-Gen.* 26; Opinion of NATHAN CLIFFORD, 4 *Id.* 600; *Cook v. Commissioners of Hamilton*, 6 *McLean*, 112, 119; *Guidet v. Mayor, &c.*, 10 *Hun*, 566; *Milwaukee Harbor case*, *Hasbrouck v. City of Milwaukee*, 13 *Wis.* 37; 17 *Id.* 266; 21 *Id.* 277; 22 *Id.* 297; 25 *Id.* 122.

In so far as it is held in the last mentioned case, that the city is not liable without its assent to the legislation, the case is contrary to the settled rule here. *People v. Flagg*, 46 *N. Y.* 401; *People v. Batchellor*, 53 *Id.* 128.

† As to the requisite definiteness of a plan, see *Wilson v. Lynn*, 119 *Mass.* 174.

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vation to the proper officers, of power to make changes in detail, and fix the prices of extra work, if any should be so required, is valid.*

Whether a municipal corporation can be held on an implied agreement, or a *quantum meruit*,—*Query?* *

Where, under such a contract, changes were made by the city officers, but performance of the work as thus increased was stopped by the city before its completion,—*Held*, that the contractors could recover against the city for work actually done up to the amount of the appropriation.

The fact that the account, as finally stated, including the cost of changes, exceeded the appropriation, does not vitiate the contract, nor preclude a recovery up to the limit of the appropriation.

Expenses of the preliminary plan, &c., and incidental expenses of the city government, relating to the work and the controversy respecting it, but not actually incurred in the construction of the work, and expenses incurred after the contractors were stopped,—*Held*, not a part of the entire cost, within the meaning of the proviso.

An act of the legislature, passed after work in excess of an appropriation has been done, authorizing a further appropriation for the completion of the work, is a ratification of the prosecution of the work beyond the original limit of cost.†

Referees found that plaintiffs, but for a limit of appropriation, would be entitled to recover a specified sum from the municipal corporation defendant, but that applying the limit, they were entitled only to recover a less sum, for which the referees gave judgment. *Held*, on plaintiffs' appeal, that the court, although of opinion that the supposed limit was not applicable, were not authorized by the statute (*Code Civ. Pro.* § 1817), to modify the judgment by increasing it; but must affirm it.‡

* See note at the end of the case.

† Where extra work under a mail contract was called for, the government claiming that no extra compensation could be claimed; and the contractors rendered it, insisting that they would be entitled to extra compensation; and Congress passed an act referring their claim, to determine whether any, and if so what extra compensation was due, with a direction as to the measure of damages,—*Held*, by the supreme court of the United States, that this was a recognition of the claim for extra compensation for extra work shown to have been done. *Robert case*, 11 *Cl. of Cl.* 98.

‡ The importance of this question is much enhanced by the fact, that under the new procedure numerous issues may be involved in

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Appeal by both parties from a judgment.

William C. Kingsley and Abner C. Keeney sued the city of Brooklyn to recover a balance of \$178,000, claimed due for work and materials for the Hempstead reservoir under a contract made between the city, by the Permanent Board of Water and Sewerage Commissioners for the city, and the plaintiffs. The ma-

the same case. In general, where the referee or jury finds the facts, the appellate court may give the appropriate judgment.

It would seem that the principle of modifying by increasing when an increase results from the appellate court applying the law to facts correctly found is desirable, if not essential in cases, for instance of several causes of action, or of counter-claim. If the court of first instance, without error in its proceedings finds the facts on several issues, but in applying the law, errs and refuses to give judgment for a claim, or part of a claim, to which a party was entitled, the appellate court must either be entitled to increase the judgment within the limits marked by the verdict or other findings of fact, or it must award a new trial of the facts which it has determined are correctly found, for the mere purpose of getting a new conclusion of law below which it can affirm. The only direct authority precisely in point sustains the power of the court to increase. *Canaday v. Stiger*, 35 *Super. Ct. (J. & S.)* 423, was an action by a vendor of houses and lots, to recover back from the purchaser an alleged over-allowance made in the price for incumbrances, the amount of which had been over-estimated. The purchaser set up a breach of an alleged implied covenant on the contract, for which he claimed nearly an equal sum against the plaintiff. The referee found as matter of fact, that each claim was substantiated, and found the amount of each. As matter of law he found, that defendant was entitled to recover for the alleged breach of covenant, and gave judgment for the difference. The appellate court *held*, that there was, in law, no such implied covenant, and if there was, it was merged in the deed. Consequently, plaintiff was entitled to recover without deduction. *MONELL, J.*, said: "As the facts are all before us, and the amount which plaintiff should recover can readily be ascertained by computation, there is no need of a new trial." They accordingly increased the judgment, and affirmed it as increased. The court of appeals, without discussing the power of the appellate court to do so, *held*, that it was right in adding to the judgment.

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terial allegations of the pleadings which are indicated in the opinion, are more fully stated in the report of the motion for a reference (1 *Abb. New Cas.* 111).

The gist of the defense was, that the city designed to have a storage reservoir, complete, with paved slopes and dam, at an expense of \$1,400,000, and with a capacity of 1,000,000,000 gallons; but that when the plaintiffs ceased work \$1,342,896.63 had been spent, and the work was left unfinished with a claim for \$178,000.

Charges of fraud made in the pleadings were not sustained by proof.

The system of statutes under which this work was carried on were as follows :

The first act upon the subject was passed April 12, 1855. It created a private corporation, known as the Nassau Water Company, with power to build works, &c., and to supply the city of Brooklyn and its inhabitants with water (see *Laws of 1855*, chap. 333, p. 601). Section 26 provided that the city of Brooklyn, on paying the stockholders, might assume the work; and upon such assumption the entire property should vest in the city.

On February 11 1857 (1 *L.* 1857, p. 35, c. 22), an act was passed which provided that all the property and works of the Nassau Water Company should, upon certain conditions, become the property of the city.

By the second section of the act, a board of water commissioners was created, charged with the duty of constructing and completing said works according to a contract already made between H. S. Wells & Co. and the Nassau Water Company.

Section 3 of the act named the directors of the Nassau Company as a board of commissioners to complete the work, and to hold office until it should be completed.

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Section 9 provided for the issue of bonds of the city to pay for the work.

On April 16, 1859, another act was passed, entitled "An act to provide for the supply of the City of Brooklyn with water" (*L.* 1859, p. 924, c. 396).

Section 2 of this act provided that "when the said water works shall be completed so as to be capable of delivering and distributing ten millions of gallons daily, the commissioners should certify the same to the common council of said city, and thereupon the exclusive control and management thereof, as fast as the same shall be completed, should be transferred to a permanent water board to be created.

Section 3 created the permanent water board, to consist of four commissioners; and the section declared that the permanent board is charged with the duty of managing said works so as to attain the object for which they were constructed, and of keeping them in a state of efficiency and repair; and the board is authorized from time to time to expend such sums of money as shall be appropriated by the common council for those purposes.

By act of May 11 (*L.* 1865, p. 1412, c. 699), the authority conferred upon the board of construction by the act of 1857 was devolved upon the permanent water board. April 2, 1869, was passed "An act to reorganize the board of water and sewerage commissioners of the City of Brooklyn," &c., &c. (1 *L.* 1869, c. 97, p. 168). By this act all the powers then possessed by the permanent water board were transferred to the board reorganized by this act.

On May 5, 1870, an act was passed (2 *Laws of* 1870, p. 1506, c. 652), amending the last mentioned act in several particulars. Section 5 of this act of 1870 was as follows :

"§ 5. It shall be the duty of the said commissioners

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to prepare and submit to the common council of said city, at as early a day as practicable, a plan for furnishing an increased supply of water for said city, including such extension of the present works, and the construction of such further reservoirs, conduits and other structures as may be necessary for that purpose, together with an estimate of the probable expense thereof. The said common council shall examine such plans and estimates, and shall determine what may be most expedient for the object aforesaid to be done, and may adopt such plan, or any portion thereof, as it may deem proper, and thereupon the said commissioners shall proceed to carry such determination into effect as provided by this act. They shall acquire in the name of the said city the title to such lands, ponds and streams as may be necessary, but, before any purchase shall be made thereof by them, they shall report the terms and conditions to the said common council, and obtain its approval thereof. Upon the approval by said common council of the before mentioned provisions, the said commissioners shall cause said work to be done, and shall employ proper persons to inspect the same."

Section 6 declared that the provisions of the above mentioned acts of 1855 and 1859, "for the acquiring of lands, ponds and streams, by purchase or otherwise; for ascertaining the compensation to owners and occupiers of land or water which may be taken or used, and the payment thereof; for the issuing of the bonds of said city for the payment of the expenses authorized by this act; for the levying by tax on the taxable property in said city the amounts necessary to pay such bonds and the interest thereon as it shall become due; for the sale of such bonds; and for the pledge of the property of the said city for the payment of such bonds, are hereby adopted as a part of this act, so far

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as they can be made applicable to the purposes hereof."

There was no limit of cost or expense in the act, other than that implied in the provision for fixing on a plan, with estimates.

The referees found that the commissioners, in pursuance of the duty enjoined by the act of June 27, 1870, submitted to the common council a plan with an estimate of expense. The engineer's report accompanying it suggested the possible desirableness of a change in the plan by taking in a then existing pond, but added that the total cost would not be enhanced by so doing. The common council referred the plan and accompanying report to a committee, upon whose report the resolutions were adopted, which declared, 1, the expediency of constructing a storage reservoir of 1,000,000,000 capacity; 2, that the plan submitted was approved and adopted; 3, that a sum not exceeding \$1,400,000 is hereby appropriated for the payment for land, and the complete construction; 4, that city bonds be issued from time to time for that amount, as required for the purpose of meeting such appropriation.

After much opposition, and a veto by the mayor, this ordinance was passed, over the veto.

Subsequently the legislature passed chapter 47 of the *Laws of 1871* (February 18), the material parts of which are as follows:

"An act to provide for the further supply of the city of Brooklyn with water, and for the payment of the expenses thereof."

"§ 1. It shall be the duty of the permanent board of water and sewerage commissioners of the city of Brooklyn to proceed to carry into effect the plan for the furnishing an increased supply of water for said city, and for such extension of the present water works

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of said city, and the construction of such further reservoirs, conduits and other structures as may be necessary for that purpose, heretofore submitted by the said board to the common council of the city of Brooklyn, and approved by a resolution of the board of aldermen of said city, on the 11th day of July, 1870, provided the whole expense thereof shall not exceed the sum of \$1,400,000, and which said resolution was finally adopted by the common council of said city by a two-third vote, on the 12th day of December, 1870, and to that end the said permanent board of water and sewerage commissioners shall acquire, in the name of and for the city of Brooklyn, the title to such lands, ponds and streams as may be necessary therefor; but before any purchase shall be made by said permanent board of water and sewerage commissioners, they shall report the proposed terms and conditions thereof to the said common council, and obtain its approval of the same. Upon the acquisition of said lands, ponds and streams under this act, the said permanent board of water and sewerage commissioners shall cause the necessary work to carry said plan into effect to be done, and shall employ proper persons to inspect the same."

Section 2 declared that the provisions of the above-mentioned acts of 1855 and 1859, "for the acquiring of lands, ponds and streams, for ascertaining the compensation to owners and occupiers of land or water which may be taken or used, for the issuing of the bonds of said city, the proceeds of which said bonds shall be used for the payment of all the costs, charges and expenses authorized by this act, as also the costs, charges and expenses heretofore incurred by said permanent board of water and sewerage commissioners for preparing the plan aforesaid, for the levying by tax on the taxable property of the city of Brooklyn, the amounts necessary to pay such bonds, and the interest thereon as they shall become due, for the sale of such bonds

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and for the pledge of the property of said city for the payment of such bonds, are hereby adopted as a part of this act so far as they can be made applicable to the purposes hereof."

The referees found that the plan referred to in this act of 1871, at the time of its adoption, contemplated that the reservoir was to be constructed according to the specifications, and such changes thereof as might from time to time be deemed necessary by the board of water and sewerage commissioners, or their engineer, as provided in the specifications. The cost of the entire work was estimated at \$1,393,743.

That thereafter the board decided that it was necessary to take more land so as to include the mill-pond known as Nichols' pond ; and adopted a new map ; and the city with the approval of the common council acquired the necessary additional land, at a cost of about \$50,000.

The board invited five experienced contractors to submit proposals for the work, upon specifications furnished by the board, which differed in some details from those submitted to the common council. On receiving the proposals, the board voted to award the contract to the plaintiffs, whose proposal was the lowest, if they would make a further reduction. A contract was then executed, dated January 9, 1872, for the whole work ; but with still further changes of detail.

In the contract as executed, there was no clause requiring an engineer's certificate of completion of the work. There was a provision that if anything shall have been accidentally omitted in the plans and specifications referred to therein, which shall be deemed by the engineer appointed by the water and sewerage commissioners to inspect the materials and superintend the work, essential to the proper construction and efficient working of the reservoir and appurte-

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nances, then the materials and work necessary to supply such omission shall be furnished and done by Kingsley and Keeney under the direction of the said engineer, and at a price to be named by him, should there be no price affixed to the same in the schedule of prices annexed to the specifications.

After the execution of the contract, changes were made by and under the direction and authority of the chief engineer, under the provisions in the contract, and which were contained in the specifications submitted to the common council authorizing him to make modifications and changes in the construction of the work.

In the summer of 1873, the dam at Nichols' pond having given way, it was removed, and a bed of muck, discovered under the bottom of the pond, was excavated and removed, thus enlarging the area of the reservoir.

The referees found that the chief engineer deemed each of these changes necessary and proper, and in directing them to be made he acted in good faith; and none of the changes were directed or made with the intention of increasing plaintiffs' profits, or benefiting them. And none of the changes changed the substantive plan for furnishing an increase of supply water for the city of Brooklyn, adopted by the common council, as before stated. They were merely additions, omissions, modifications, and changes of the details of the mode and manner of constructing the reservoir and other structures necessary to carry the plan into effect.

During the progress of the work the plaintiffs were paid \$1,094,137.92 on account, before they were directed to stop work; and the referees found that there remained unpaid, on account of the work \$167,799.77. April 17, 1874, the engineer, under instructions of the board, directed plaintiffs to cease work on

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the Nichols' pond ; August 6, to cease work on the storage reservoir, and confine operations to completing the dam ; August 19, to cease all work. Insufficiency of funds was assigned as the reason.

May 8, 1875, on the application of the city, the legislature passed chapter 258, as follows :

"Section 1. Upon the approval of the plans, specifications and estimates therefor by the common council of the city of Brooklyn, the board of city works of said city are hereby authorized to complete the Hempstead reservoir ; and for that purpose the said city is hereby authorized to issue such bonds as said common council may deem necessary, not exceeding \$500,000 in amount ; and no such plans, specifications and estimates shall be approved, nor shall such work be done, except upon a stipulation, under suitable penalties, that the work aforesaid shall be fully finished and completed for the sum aforesaid."

The city then took possession of the work, against the remonstrance of the plaintiffs.

The referees concluded as matter of law, that the common council were authorized to adopt the plan, on the estimate of cost ; that the additional land was lawfully acquired ; that the contract was lawful and obligatory on the city, the changes lawfully made, and the plaintiffs were not to be required to produce any certificate of performance. That neither the cost of plans, &c., incurred before the act (ch. 47) of 1871, nor the cost of city officers, &c., visiting the works, &c., could be deducted from the limited appropriation.

The result was that while \$167,799.77 was found to be due under the contract, they allowed plaintiffs to recover only up to the appropriation, viz., \$107,837.25, leaving the residue of nearly \$60,000 unpaid, which they held not recoverable as incurred in excess of the appropriation.

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The referees, Hon. JOHN A. LOTT, and THOMAS H. RODMAN and GEORGE H. FISHER, Esqs., in their opinion, after holding that the allegations of fraud and collusion were unsupported, passed on the legal questions as follows :

“ Another objection urged by the defendant’s counsel is that the contract, as executed, was not in accordance with the plans and specifications originally submitted to the bidders, but was, prior to execution, changed in many important particulars, all in the interest of the plaintiffs and to the prejudice of the defendants.

“ It is true that intermediate such submission of the plans and specifications and the formal execution of the contract, the chief engineer, apparently on his own responsibility, omitted several articles of the specifications, altered others by erasures and interlineations, as stated in our report, and (section) inserted number 52, as shown in the report, in place of the original section designated by the like number, by pasting a printed slip, containing the arbitration clause, so called, over the original section, which the plaintiffs had objected to on account of its arbitrary character. Those changes were no doubt made by him by virtue of his supposed power as chief engineer, and that of the water board, expressly reserved in the specifications themselves ; which power, in our opinion, clothed him and the board with requisite authority to do so. If the chief engineer and the water board—one or both—could lawfully change the “ designs ” or “ the plan ” of the reservoir, “ as the work progressed,” or “ alter the amount or character of any particular piece of work,” and the contractors were bound to make any such required change accordingly, in “ conformity with the directions of the engineer ” (in the words of the contract), the changes in question, preliminary to the execution of the contract, cannot defeat the contrac-

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tor's right to recover for work actually done under the contract and in obedience to the directions of the engineer.

"It was very earnestly argued by the defendant's counsel, that such a construction would be fatal to the rights of the city, because, if the engineer or the board could change the plan or vary the details of the work in one instance, they could in any number of instances, and thus change the whole plan. The power was certainly liable to be abused, but so is every power devolved upon public officers. The only question in this respect submitted to us is,—is there such a power, and if so, what are its limits? We have no right to sustain or reject it, according to our views of the propriety or wisdom of conferring it. That was for the common council, that approved of the power, and for the legislature, that authorized it, to determine . . .

"It may well be, that the reservation of such a power to the city, to be exercised necessarily by some of its officers, was a wise and usual provision in such a contract for a work of such magnitude, and about the success of which a serious difference of opinion existed.

"As to the effect of the changes upon the plaintiffs' right to recover, the question is narrowed to the right to change section 52, or the arbitration clause; for there is no evidence that they in any way influenced or attempted to influence the making of the other alterations.

"We conclude that their right to recover is not impaired by any of those changes of the specifications by the chief engineer prior to the execution of the contract.

"But even assuming the contract was authorized by the act of 1871, and contemplated the carrying out of the plan approved by the common council, the defendant's counsel, with great positiveness, insists that still

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the plaintiffs cannot recover ; because that plan prescribed the limits of the power of the city to bind itself ; that any departure from it was *ultra vires* ; any work done or materials furnished *outside of the plan*, —as they say,—was done and furnished without lawful authority, and any money already paid therefor, can be either recovered back or its amount should be set-off against any claim for work done or materials furnished *within the plan*. They say the plan was a *specific* plan ; that the specifications of the details of work and materials were fixed and inflexible. That the water board and its engineers, in constructing the reservoir, departed widely, and in numerous instances, from those specifications ; and, therefore, the plaintiffs who performed such work, and furnished such materials, acted in their own wrong, and the city, although in possession and enjoyment of the work, is not liable.

“After the most careful consideration, demanded by the importance of the controversy, and the zeal and ability with which the defense has been conducted, we are unable to apply the doctrine of *ultra vires* to the case. We think the argument is based upon an erroneous assumption of fact. The defendant's counsel assume that the plan is *specific* ; meaning that the details of work and material are fixed and inflexible. They give no effect to the power to change the plan of the work, or the amount and quality of any particular piece of work. Divest the plan of that feature, and there would, to say the least, be an essentially different case to which to apply their argument.

“In our opinion, none of the changes made by Col. Adams, which the plaintiffs carried out under his direction, were *outside of the plan* authorized by the common council in such a sense as to defeat the plaintiffs' right to recover.”

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“If the power of the city to purchase were expressly limited to the exact area of land laid down on the land plan or the outline of the reservoir submitted to the common council, the objection of the defendant's counsel would be a serious one, as affecting the title to the pond and the other additional land thus acquired.

“Upon that objection being first made, we doubted whether the power was not thus limited. A full and careful examination has removed that doubt and satisfied us that the act of 1871 contained authority to the water board, in the name of the city, to make the purchase actually made, and that its power was not there thus limited.

“Section 1, after requiring the water and sewerage commissioners to carry out the plan of the reservoir at an expense not exceeding \$1,400,000, declares that, ‘to that end,’ that is, in order to carry out the plan of the reservoir, ‘the commissioners shall acquire, in the name of the city, the title to such lands, ponds and streams as may be necessary therefor;’ not such lands, ponds and streams as are laid down or described in said plan, but such as shall ‘*be necessary*’ to carry out the plan. The carrying out of the plan was one thing; the acquisition of the lands, ponds and streams, necessary therefor, was another, connected with the first, but to be accomplished independently of and preliminary to it.

“The power is certainly *not in terms* limited to a specific quantity of land. We do not think the context, or the circumstances surrounding the adoption of the act, require the narrower interpretation. Mr. Justice BARNARD, in the mandamus case, and Mr. Justice GILBERT, in the suit of these plaintiffs against the city, both held that the title to the land purchased was in the city; and, in the last case, the city assumed that as the foundation of its defense, and the court held accordingly. . . This view of the act is in harmony

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with the character of the plans and specifications submitted to the common council as we regard them."

"Another defense is, that the fund of \$1,400,000 has been exhausted, and, therefore, the city is not liable for the balance due on the contract. If the fact was so, this would be a complete defense, for the liability of the city as a corporation is clearly limited to the appropriation of \$1,400,000. However morally just the plaintiffs' claim may be, that is the limit to which it can be enforced. It is necessary, therefore, to ascertain the state of the appropriation in respect to the right of the plaintiffs to charge it for their compensation.

"It appears by the accounts of the comptroller, and also by that of the water board, that there is an unexpended balance of upwards of \$57,000 still in the treasury, and in both of those accounts are included payments amounting to nearly \$23,000 for costs, charges, and expenses incurred by the permanent board of water and sewerage commissioners, under section 5 of the act of May 5, 1870, in preparing a plan to submit to the common council for furnishing an increased supply of water for the city.

"No portion of that sum is properly chargeable against the fund. Section 1 of the act of February 18, 1871, directed the board to carry that plan into effect, limiting the expense thereof to \$1,400,000, and the common council, on approving it, on July 11, 1870, by a resolution of that date, had appropriated the whole of that amount 'for the payment of the land required for the reservoir and the complete construction thereof.' This clearly should not authorize the payment of any part of the appropriation for expenses incurred for any other purpose. Any diminution of the amount would reduce the means of carrying the plan into effect. When the board of water and sewerage commissioners submitted the plan to the common council, it was

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accompanied with an estimate of the expense thereof, and that showed that it was estimated at \$1,393,743.

“It is, therefore, apparent that it was not contemplated by the common council that the appropriation limited by their resolution for the payment of the land required ‘for the reservoir and the complete construction thereof,’ should be applied to the payment of expenses already incurred; and the legislature, in directing the work to be done and that the expense thereof should not exceed the sum of \$1,400,000, had reference to *future* expenditures therefor. And then, by section 2 of the act of 1871, make provision for raising that amount by a sale of bonds of the city, to be issued for that purpose. It, after extending and adopting the provisions of previous acts of the legislature for the issuing of such bonds, and other subjects to the said act, so far as they could be made ‘applicable to the purposes thereof,’ declares as follows: ‘The proceeds of which said bonds shall be used for the payment of all costs, charges, and expenses *authorized by this act, as also* the costs, charges, and expenses *heretofore* incurred by said permanent board of water and sewerage commissioners for preparing the plan aforesaid.’ It provides for the application of the proceeds of the bonds to the distinct and different classes of expenditures; the first applies to expenses authorized by that act—being those to be incurred ‘to carry into effect the plan for the furnishing an increased supply of water for said city, approved by a resolution of the board of aldermen of the said city, on July 11, 1870;’ the other relates and applies to expenses that had, previous to the passage of that act, been incurred by the board of water and sewerage commissioners for preparing the plan aforesaid.

“There are other payments charged against that fund, which are, in our opinion, not allowable as against the plaintiffs. Some for expenses incurred

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after the contract for the construction of the works was entered into on behalf of the city with them, and before they were ordered to stop work, and the rest for expenditures after the work was stopped."

Both parties appealed from the judgment.

Wm. C. De Witt and *John E. Parsons* (*Wm C. De Witt*, corporation counsel), for the defendants, in support of the defendants' appeal,—As to the point that the recovery must be limited to the amount of the unexpended appropriation: Act of February 18, 1871; *McDonald v. Mayor, &c. of N. Y.*, 68 *N. Y.* 23; *Donovan v. The Same*, 33 *Id.* 291. That plaintiffs were not entitled to recover at all, 1. Because the contract was invalid: *L.* 1862, 200; *L.* 1865, 143; *L.* 1859, 924; *L.* 1860, 168. 2. Because of failure to produce certificate of acceptance by water board: *Ellis v. Mortimer*, 1 *B. & P. N.* 257; *McCarren v. McNulty*, 7 *Gray*, 139; *Aiken v. Hyde*, 99 *Mass.* 183; *Goodrich v. Van Northwiche*, 43 *Ill.* 336; *Hunt v. Leyman*, 100 *Mass.* 198; *Draper v. Jones*, 11 *Barb.* 263; *Heron v. Davis*, 3 *Bosw.* 336; *McMahon v. N. Y. & Erie R. R. Co.*, 20 *N. Y.* 463; *United States v. Robeson*, 9 *Peters*, 319; *Smith v. Briggs*, 3 *Den.* 73; *Wyckoff v.*, 44 *N. Y.* 143; *Glacius v. Black*, 50 *Id.* 145; *Grube v. Schultheiss*, 4 *Daly*, 207. 3. Because they cannot be paid for work outside of the plan: *People v. Field*, 58 *N. Y.* 505; *Supervisors v. Ellis*, 59 *Id.* 620. And money so paid can be recovered back: *Hodges v. Buffalo*, 2 *Den.* 110; *Starin v. Town of Genoa*, 23 *N. Y.* 449; *Farmers' Loan & Trust Co. v. Carrol*, 5 *Barb.* 649; *Brady v. Mayor, &c.*, 2 *Bosw.* 183, aff'd 20 *N. Y.* 312; *Hanghewout v. Mayor*, 2 *Abb. Ct. App. Dec.* 345; *Donahue v. Mayor*, 10 *Hun.* 37; *Bigler v. Mayor*, 6 *Id.* 239; *McDonald v. Mayor*, 68 *N. Y.* 23.

In opposition to plaintiffs' appeal they cited,—As to want of power of the court under the Code to enlarge

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the plaintiffs' judgment: *Code of Civ. Pro.* §§ 1317, 1320, 1321. As to limit of expense in executing plan: *L.* 1865, c. 721, §§ 6, 7; *L.* 1854, p. 853, c. 384, tit. 3, § 15; *L.* 1862, p. 204, § 40; *L.* 1859, p. 924, c. 396, §§ 1, 10; *Matter of Second Ave. M. E. Church*, 66 *N. Y.* 398.

Joshua M. Van Cott and *Benjamin F. Tracy* (*B. F. Tracy*, attorney), for plaintiffs, in support of plaintiffs' appeal,—As to the point that the judgment should have been for the value of the work done, and materials furnished: *L.* 1855, p. 601, c. 333, § 26; *L.* 1857, p. 35, c. 22; *L.* 1859, p. 924, c. 396; *L.* 1865, p. 1412, c. 699; *L.* 1869, p. 168, c. 97; *L.* 1870, p. 1506, c. 652, §§ 5, 6; *L.* 1871, p. 56, c. 47; *L.* 1875, p. 249, c. 258; *Sedgw. on Stat.* 354, and cases in foot-note; *Silver v. Ladd*, 1 *Wallace*, 219; *Muller v. Mayor*, 63 *N. Y.* 357-8; *Smith v. People*, 47 *N. Y.* 336-7; *Sussex v. Peerage*, 11 *C. & F.* 86; *Newell v. People*, 7 *N. Y.* 97; *McCluskey v. Cromwell*, 11 *Id.* 593; *Com. Dig.* Parliament, 11; *People v. Clute*, 63 *Barb.* 356; *Tonnele v. Hall*, 4 *N. Y.* 144; *People v. Utica Ins. Co.*, 15 *Johns.* 358, 380; *Butterfield v. Rudd*, 58 *N. Y.* 489, 490. As to ratification by act of 1875 of what had been done in excess: 56 *N. Y.* 261; *Cooley on Const. L.* 374-9; *Dillon on Mun. Corp.* 46; *Ang. & A. on Corp.* § 264 a; 19 *N. Y.* 218; 21 *Wis.* 217; 5 *Otto*, 644; *Brown v. Mayor*, 63 *N. Y.* 239, and cases cited by counsel; *Nelson v. Mayor*, *Id.* 535, 545; *Thomson v. Lee County*, 3 *Wallace*, 327, 331; *Campbell v. City of Kenosha*, 5 *Id.* 195; *Supervisors v. Schenck*, *Id.* 772; *City v. Lamson*, 9 *Id.* 478, 485; *Union Pac. R. R. Co. v. Hall*, 1 *Otto*, 343, 353; *Hasbrouck v. City of Milwaukee*, 21 *Wis.* 217; *Dillon on Mun. Corp.* §§ 46, 385; *People ex rel. McLean v. Flagg*, 46 *N. Y.* 401, 406. As to excess having been condoned, the obligation incurred became a valid debt: *Ang. & Ames on Corp.* § 264 a; *White Water Canal Co. v. Valette*, 21 *How. U. S.* 414; *People v. Brooklyn*,

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22 *Barb.* 404; *Sedgw. on Stat.* 531; Sibley v. City of Mobile, 4 *Am. L. Times R. N. S.* 226; City of Galena v. Amy, 5 *Wall.* 708; *High on Eq. Rem.* § 397; Supervisors v. United States, 4 *Wall.* 435; Marsh v. Town of Little Valley, 64 *N. Y.* 112; Cummings v. Brooklyn, 11 *Paige*, 596; Beard v. Brooklyn, 31 *Barb.* 142; Baldwin v. City of Oswego, 1 *Abb. Ct. App. Dec.* 62; Hines v. City of Lockport, 50 *N. Y.* 239; Messenger v. City of Buffalo, 21 *Id.* 196; Clark v. Miller, 54 *Id.* 528; Dannat v. Mayor, 66 *Id.* 589; United States v. Clark County, 5 *The Reporter*, 131; 68 *N. Y.* 114; 51 *Id.* 401. As to court increasing the amount of the judgment: 66 *Id.* 506, 517; *Code*, § 1317; Andrew v. N. J. Steamboat Co., 11 *Hun*, 490; Edwards v. Aberayon Mut. Ins. Co., *L. R.* 1 *Q. B. Div.* 563, 581; Browning v. Prov. Ins. Co. of Canada, *L. R.* 5 *Privy Council Appeals*, 263, 376; Alvord v. United States, 5 *Otto*, 356, 359; Lee v. Adsit, 37 *N. Y.* 78, 98; Canady v. Stiger, 55 *Id.* 453, 456; reported below in 35 *N. Y. Super. Ct. (J. & S.)* 423; Millard v. McMullin, 68 *N. Y.* 345, 355; * Hannahs v. Hannahs, *Id.* 610, 613; 12 *Id.* 336; 28 *Id.* 508; 46 *Id.* 627; 57 *Id.* 560; 59 *Id.* 244.

In opposition to defendant's appeal they cited,—as to there being no fraud: *Greene v. City*, 60 *N. Y.* 303; *People v. Van Nort*, 64 *Barb.* 205; *Earl v. Peck*, 64 *N. Y.* 596; *Worth v. Case*, 42 *Id.* 362; *Sherman v. Mayor*, 1 *Id.* 316. As to performance of contract: *Clark v. United States*, 6 *Wall.* 543, 547. As to want of final estimates, and certificate being excused by defendants stopping further execution of the contract: *Hochter v. Delatour*, 20 *Eng. L. & Eq.*; *Burtis v. Thompson*, 42 *N. Y.* 246; *Shellington v. Howland*, 53 *Id.* 372; *People v. Bartlett*, 3 *Hill*, 570; *Heine v. Meyer*, 61 *N. Y.* 171; *Niblo v. Binsse*, 3 *Abb. Ct. App.*

* Reported below in 5 *Hun*, 572.

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Dec. 375 ; *Omaha v. Hammond*, 4 *Otto*, 98 ; *McMahon v. Erie R. Co.*, 20 *N. Y.* 463 ; *Bowery Bank v. Mayor*, 63 *Id.* 339 ; *Phillips v. Seymore*, 1 *Otto*, 653 ; *Thomas v. Fleury*, 26 *N. Y.* 26 ; *Devlin v. Second Ave. R. R. Co.*, 44 *Barb.* 81, 84. As to voluntary payments : *Knowlton v. Congress, &c. Spring Co.*, 57 *N. Y.* 518 ; *Flower v. Lance*, 50 *Id.* 603, 610 ; *R. R. Co. v. Marsh*, 12 *Id.* 308 ; *Parish v. Wheeler*, 22 *Id.* 494 ; *Whitney Arms Co. v. Barlow*, 63 *Id.* 62 ; *Supervisors v. Ellis*, 59 *Id.* 620.

BY THE COURT.—NEILSON, Ch. J.—The appeal by the defendant brings up the question whether the referees erred in ordering the judgment that was entered ; the appeal by the plaintiffs, the question whether the referees should have directed judgment only for an amount equal to the unexpended part of the original appropriation, and if not, the further question whether we have the power to modify the judgment by ordering that it be increased to the sum found due.

We take up, as first in order, the case on the defendant's appeal.

The legislature had imposed upon the permanent board of water and sewerage commissioners the duty of preparing and submitting to the common council of the city of Brooklyn a plan for furnishing an increased supply of water for the city, including such extension of the present works and the construction of such further reservoirs, conduits and other structures as might be necessary for that purpose, together with an estimate of the probable cost thereof, and directed them to acquire, in the name of the city, the title to such lands, ponds and streams as might be necessary (*Laws of 1870*, ch. 652).

A plan was prepared, submitted to the common council, and approved.

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By another statute the commissioners were directed to carry that plan into effect, and to cause the necessary work to be done. The direction in the former act as to acquiring the necessary lands, &c., was repeated, and authority given to the city to issue bonds (*Laws of 1871*, ch. 47).

Before proceeding to contract for the work, and upon the advice of the chief engineer, Mr. Adams, the commissioners obtained from contractors estimates and bids for the different kinds of work proposed to be done, but the engineer advised the commissioners not to accept either of the bids, as the price charged for excavation was considered too high. He stated that the bid of Kingsley & Keeney was the lowest of the five estimates received, and that, if they would reduce the charge for excavation to fifty-five cents per cubic yard, the contract should be given to them; that their bid would then be \$44,675 lower than that of either of the other parties, and in that statement and recommendation, Mr. Kirkwood, the other engineer, concurred. The proposed reduction having been assented to, the agreement under which these plaintiffs have performed work and furnished materials, as found by the referees, was executed, under date of January 9, 1872.

The first question is as to the validity of that agreement.

There was no call for bids with a view to public competition, nor need there have been. A board of commissioners charged with the duty of contracting could do so as at the common law, save when expressly directed and restrained (*Hobert v. City of Detroit*, 17 *Mich.* 246; *Miller v. City of Milwaukee*, 14 *Wis.* 642).*

* In *Miller v. Milwaukee* (14 *Wis.* 642, [1861]), opinion by DIXON, Ch. J., it was held that the general powers possessed by municipal corporations at common law, these words occurring in the defendants'

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From the course of legislation with us, it appears that this board, in letting out work of this class, was under no prescription as to inviting competition. It is to be further observed that the acts of 1870 and 1871, before referred to, left the commissioners to contract, with such observances, and in such forms, as might be found expedient. That, in such a case, competing contractors need not be called in, was determined in *Greene v. Mayor, &c. of New York* (60 *N. Y.* 303). This view disposes of one element of the objection that changes were made in the specifications after the several proposals had been put in, and before the contract was signed. In the absence of fraud it is not, in a legal sense, material whether all the proposing contractors saw the specifications, as modified, or not. As the commissioners could legally enter into the contract

charter, was sufficient to authorize it to contract to build a break-water to preserve certain streets from being destroyed by the action of the waters of the lake.—DIXON, J., says :

“We are of opinion that the counselors and aldermen possess the power, and that it was rightly exercised. Municipal corporations are instituted for the advancement and regulation of trade, the local administration of justice, and the better government of their particular vicinities. And for these purposes they are by the common law invested with the power of making ordinances and by-laws. *Willcock on Mun. Corp.* 16 (12 *Law Library*, 10). They may also elect, govern, and remove their members, and regulate their franchises and property. *Id.* 298 (12 *Law Library*, 164). They possess power to lay out, open and repair streets and highways, to establish companies to protect the property of the citizens from destruction by fire, and to levy taxes to defray the expenses.”

In *Sturtevant v. Alton*, 3 *McLean*, 393 (1844, opinion by McLEAN, J.),—*Held*, that a municipal corporation having power to grade streets, has necessarily power to make contracts respecting the same and every incidental power necessary thereto.

In *Rome v. Cabot*, 28 *Geo.* 50 (1859, opinion by LUMKIN, J.),—*Held*, that the construction of water-works is within the general power conferred on a municipal corporation to make all contracts which they deem necessary for the welfare of the city.

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without calling in competitors, they could do so without recalling them.

The charges of fraud, collusion, conspiracy and favoritism set up in the answer to impeach the contract and what was done under it, appear to have been duly considered by the referees. In their opinion they discuss the matter, and in their report find that there was no proof to support those charges. I have carefully gone over and analyzed the testimony and the papers in these appeal books, and sought to apprehend the force, effect and relation of the circumstances, and am satisfied that the referees were correct in the conclusion stated by them.

As the city could not, in the exercise of its inherent and implied powers, pledge its credit in acquiring and improving lands outside of the city limits, the legislative direction given was to be respected; this contract so framed as to carry out substantially the purpose of the legislature. It was as the case of an agent acting on the instructions of a principal. As suggested by one of my brethren on the argument, a corporate authority to expend \$1,400,000 would not support an agreement to pay \$2,000,000, and the parties acting were bound to know the terms of the statute. In this point of view, it is material that the probable expense of the work, as estimated and reported by the engineer, including the cost of 300 acres of land at Hempstead, was \$1,393,743, and that the work was let to the plaintiffs for a less sum. It further appears that, with the damages assessed and paid for the additional land, the whole expenditure, as proposed, was within the limit of \$1,400,000. We have no means, nor had the referees, of revising those estimates, no evidence tending to show that the parties had reason to doubt their correctness.

As the arrangement for the work did not involve the exercise of power greater than had been conferred

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on the city, the contract was valid and could have been enforced.

The questions raised on the argument relate to what was done under the contract as well as to the contract itself. The learned counsel for the defendant claim that the plan approved by the common council, July 11, 1870, should have been adhered to strictly ; that departures from and extensions of it were without authority. The land area in that plan having been fixed at 300 acres, it is not easy to reconcile the restrictive policy now suggested with the authority given by the act of 1871 to acquire, in the name of the city, the title to such lands, streams and ponds as might be necessary. Nor can we reconcile that policy with the extension of that land area from the 300 acres thus stated, to more than 500, including the so-called Nichols pond, now a part of the reservoir. The city acquired and paid for the increased quantity of land, and in resisting in the supreme court the plaintiffs' application for an injunction, and in showing cause for a mandamus against the water board, prevailed by alleging that the title to the land had been duly acquired, and claiming the consequent right of possession. It is quite apparent that yet more land might have been taken under the act of 1871, had that been necessary. It would seem, therefore, that neither the legislature nor the city intended to adhere very closely to the plan of July, 1870. The extension of the land and of the water area may not have been of equal necessity or importance, but the power and the election to do either deserve attention in considering the claim now presented on behalf of the defendants. That claim, if sound and enforced, would disaffirm the title of the city to the land except the 300 acres, as well as prevent a recovery for work done thereon, and would justify the reclamation of the money paid for what is now alleged to be an excess of labor and an excess of land.

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The argument in support of a theory apparently so inconsistent and inequitable depends upon the sense in which the word "plan" is to be taken, upon the terms of the contract, upon the necessity there may have been for the changes and extensions made, and upon the relation of the city to the property and to the persons in charge of and directing the work.

It appears, from the proofs in the case, that several methods for securing an increased supply of water for the city had been proposed prior to the legislation to which we have referred. That of a storage reservoir was finally approved. That was the plan which the act of 1871 directed to be carried out, and the word *plan*, thus used, distinguishes this method from the other projects which had been suggested. The legislature intended that the title to the necessary land, 300 acres or more, should be acquired, that the Hempstead reservoir should hold one thousand million gallons of water, and taking the statute as it reads, cost not to exceed fourteen hundred thousand dollars. Of the mere details of the work and materials, how much of each and how applied,—matters depending upon practical skill and experience,—the legislature could not well have taken cognizance.

We might agree with the learned counsel for the defendant, if it were material, that a municipal corporation cannot be held on an implied undertaking. But here was an express agreement. So, too, if we overlook cases like the *Harlem Gaslight Co. v. Mayor, &c. of New York*, 33 *N. Y.* 309, and *Muller v. The same*, 63 *Id.* 353, we might agree that "the principle of *quantum meruit* cannot be applied." But the prices for this work were fixed, and the method of fixing the prices of extra work, if any, prescribed. So also, we accept the definition of the word "specification" as given on the argument. But the criticism is of no moment. The paper called a specification had

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been accepted by the board of city works, and by the common council, and incorporated in the contract. In it, the right to make changes was reserved to the city, and of new and substituted work there could have been no specific account or enumeration. There can be no doubt as to the legality of such a reservation, and of the plaintiffs' covenant to carry out the work as directed. It was stipulating in the manner often found expedient between individual contractors. But it does not appear, from the proofs, that the changes in the work were made at the instance or by the procurement of the plaintiffs, and such is the finding of the referees.

According to the thirteenth section of the specifications, the dam at the southern end of the reservoir was to be placed on such ground as the engineer should direct. It was placed about 200 feet further south than had been at first contemplated. That added to the space within the reservoir, but not to the expense of construction. The same section provides for an intermediate dam, "should such division dam be considered necessary." It was not found to be necessary, and was abandoned, thus avoiding an expense of from \$230,000 to \$240,000, and, as the referees find, without prejudice to the reservoir. It was well that the questions as to the location of one dam and the building of the other were held for mature consideration. But had it been otherwise, the objections that dispensing with a useless dam, and removing the other to a better site than that first selected, were departures from the plan, would not be entitled to much respect.

The propriety, and, in an undertaking of this extended character, the necessity of reserving the right to make changes in the construction and work clearly appear in relation to the dam at the Nichols pond. That dam was to have been the northern boundary of the reservoir. It gave way, was repaired, gave way

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again, and was found to have no stability whatever. In his testimony, Mr. Probasco, the resident engineer, describes its *rickety* condition. It was liable to be swept into the reservoir by freshets. A deposit of "black muck" found in the pond, impure, if not poisonous, would also be swept into the reservoir. Thus it was that Nichols' pond, by its own force and condition rather than by the election of the commissioners and of the engineers, became a part of the reservoir, and the excavations made by the plaintiffs, in obedience to the directions given and to the terms of their covenant, were necessary, if not unavoidable. That work was a mere incident to the construction of the reservoir, as much so as the removal of a landslide would be to that of a canal. It was fairly within the statute which directed that the necessary work should be done, and it would be a reproach to the law if the stipulated compensation could be withheld.

One of the most delicate, if not difficult questions arising in the course of the work had relation to the height of the new dam, and, of necessity, to that of the water to be held by it. In what is called the plan, the flow line, representing the surface of the water, the reservoir being full, was put at thirty-two feet above the tide. Many citizens, including Mayor Kalbfleisch, were apprehensive that the dam, built at the height required by that flow line, would not be safe. So, after much consideration by the engineers, the line was lowered from thirty-two to twenty-nine, the dam to be conformed to that reduction. The consequences were an increased amount of excavation at great expense, the saving of the cost of building a portion of the dam three feet high and fourteen hundred feet long, the contributions of water from the springs reached by the deeper excavations, and the unquestioned benefit of a dam safer and more durable than it would otherwise have been.

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The learned counsel for the defendants claim that the flow line was thus lowered three feet without authority, and that there should be no recovery for the extra excavations. We cannot accept that view. The general authority to make changes in the work would have been sufficient, but the thirteenth section of the specifications expressly provided that the dam should be constructed "in every way in accordance with his (the engineer's) instructions," and it is apparent that, to lower the dam at all, involved the necessity of having the flow line, or the surface of the water, lowered to the same extent. Then, too, that question was one which the engineer only could understand and properly determine.

All the changes made in the work have been fully stated and considered by the referees. After careful deliberation, we agree with them that "the chief engineer deemed each and every one of those changes to be necessary and proper, and in directing them to be made, he acted in good faith; and none of the changes were directed or made with the intention of increasing the profits of the plaintiffs, or for the purpose of benefiting them in any manner;" that "the additions, omissions and changes did not, nor did either of them, change the substantial plan for furnishing an increased supply of water for the city of Brooklyn, adopted by the common council," and that "none of the changes made by Colonel Adams, which the plaintiffs carried out under his direction, were outside of the plan authorized by the common council in such a sense as to defeat the plaintiff's right to recover."

We have had occasion to say that the contract was valid and could have been enforced. The case of *Clark v. Mayor, &c. of New York*, 4 *N. Y.* 338, would suffice to show that agreements in such form are not regarded with disfavor. It was there held that, in a contract as to a section of the Croton aque-

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duct, a public work, the right to ~~make~~ alterations in the form and dimensions of it ~~could~~ be reserved, and that the contractors ~~were~~ bound to carry out such changes, and ~~might~~ recover for the work done. In that case, ~~as~~ in this, the work had been stopped by the commissioners before its completion (See also, *Slusser v. City of Burlington*, 42 *Iowa*, 378, and *Harrington v. Mayor of New York*, 10 *Hun*, 248).

These plaintiffs were at work on the dam when they were directed to quit: in the expressive language of the referees, "were driven from it." That order, which plaintiffs were bound to obey, as the city had the right to take possession of its property, was given under the erroneous impression that the money appropriated for the work had been exhausted. It would seem that the dam had been nearly completed. We take extracts, as to the state of the excavation and of the dam, from the deposition of Mayor Schroeder used before the supreme court, and, as matter of record, before the referees. Thus he says, "That such excavation is complete to the extent requisite to the holding of 1,000,000,000 of gallons of water, but the stone wall or dam has been erected to the height of only twelve feet," . . . "and all that is necessary in order to attain the object for which the said reservoir was constructed, and to develop its full efficiency, is to complete said stone wall or dam, which can be done at a cost not exceeding \$20,000." General Slocum, president of the board of city works, gave a like estimate of the cost. They were both speaking, no doubt, with reference to the reduced prices of labor in the market. In the contract which they afterward gave to Brady, he undertook to finish the dam, build the gate-house and other necessary works connected with the dam, for \$22,799.60. At the time the plaintiff's work was stopped there was more than \$57,000 of the appropriation in the treasury, and other sums had been misap-

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plied.* It thus appears that at the prices fixed for the work by the contract, the money remaining for use was more than sufficient to have paid for completing the dam, and that, even on the theory that the expenditure should not exceed the appropriation, the defendant put an end to the contract without cause; in other words, elected to make default.†

We are disposed to hold firmly to the distinction which exists between municipal and other corporations in respect to inferences or imputations of assent, adoption, ratification, and the like. But there are certain rules of conduct, principles so equitable as to command almost universal respect, worthy of observance by a municipal government. In contracting for, and

* Where, under the provisions of a city charter, a contractor is only payable out of a particular fund, the city will be liable to him if that fund is misappropriated by the common council. *Lansing v. Van Gorder*, 24 *Mich.* 456. And see 6 *Id.* 51.

A warrant for the payment of a sum named, "out of money in the treasury not otherwise appropriated,"—*Held*, to mean that the payment should be made out of money not appropriated to special purposes, and that the creditor need not show that there was money in the treasury, before suing, as the county was liable, whether there was any there or not. *Campbell v. Polk*, 8 *Iowa*, 467.

Where money belonging to the drainage fund of a town has been paid to the treasurer thereof it continues to be in the town treasury in contemplation of law until legally paid out therefrom; and the fact that the supervisors had used it, without legal authority, for another purpose, before entering into a contract for drainage, will not relieve the town from liability on such contract. *Hohl v. Westford*, 33 *Wis.* 324.

† Where a contractor to erect a public building, after the dissolution of the committee through whom the contract was made, and a rescission of the order appointing it, and notice by the justices not to go on with the building, still continued to act under such committee, and, by its direction, made material departures from the specifications of the contract,—*Held*, that he forfeited his right to recover the price agreed on in the contract. *McCoy v. Harnett*, 8 *Jones (N. C.) L.* 272.

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carrying on the improvement in question, the corporate authority of the city was vested in the common council and the permanent board of water and sewerage commissioners. But, during the preparation for and the progress of this work, in the order of official succession, three distinguished citizens, neither of them wanting in experience or in zealous attention to public affairs, represented the city in its highest department. Moreover, the persons appointed to have supervision of this work, and whose directions the contractors were bound to follow—several competent engineers—were the agents of the city, and there never had been a time when the city, owning the land, could not have taken more immediate charge of the work with the same right as on the day when the contractors were dismissed. If the work imposed by the enforced inclusion of the Nichols pond was not to be paid for it would have been fair and seemly to intervene at an early day. The city could not, indeed, be estopped by its silent acquiescence, as the citizen might be, but there is a strong equity in favor of making compensation for work performed, as the referees find, in good faith, in pursuance of the agreement and of the exactions of the defendant's agents.

The referees state that there was substantially no dispute before them as to the performance of the work and the furnishing of the materials, as claimed in the plaintiffs' bill of particulars. On the argument before us one of the learned counsel for the defendant made a like statement, with the suggestion that, for that reason, a compulsory reference should not have been ordered. It is well known that the application to refer would not have been granted if it could have been foreseen that the case would be thus tried on the mere questions as to the liability of the defendant, or if a stipulation, admitting the account as stated, but reserving the other questions, had been filed. But the

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court was constrained to send the case to the referees, as the account for work and materials, and the amount thereof, were put in issue by the pleadings (See opinion thereon in 1 *Abb. New Cas.* 108).

The referees find that there remains unpaid to the plaintiffs on account of the work, after the deduction of payments, the sum of \$167,799.77, irrespective of interest. That is a finding of fact, and cannot be regarded as against the weight of evidence. It was strictly in accord with the proofs, and we have no power to reverse it. It must, therefore, stand.

I am of opinion that the referees were correct in stating the account of sums which were to be regarded as misapplied, and in the restorations thus made to the fund. They regarded that fund, the \$1,400,000, as the limit of the appropriation for this work, and found, as a necessary result, that the judgment in this action could only be entered for the balance thereof remaining unapplied, with interest. The defendant prevails thus far, and that determination, in a strictly legal sense, was correct. We concur with the referees and with the defendant's counsel in their construction of the act of 1871 in respect to the limit of the appropriation. Whatever ground of complaint the plaintiffs may have, regarding the amount of the judgment as inadequate, the defendant has no legal cause to complain. It cannot be said that the contract was *ultra vires*, as if it provided for an expenditure greater than the appropriation.* If the limited amount of the judgment

* Other cases heretofore referred to, it will be seen, do not sustain the view that a municipal contract is void as *ultra vires*, because it requires more money than had been appropriated; and this could not be justly sustained because the contractor would then be liable to repay everything that he had received from the beginning; if there be a prohibition on exceeding a certain entire cost, the contract may be *ultra vires* as to the excess. See also *Jackson County v. Hall*, 53 *Ill.* 440.

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is not an answer to that objection, it cannot be said that the parties intended to evade the statutory limitation, or that the value of the entire work could have been anticipated. The mere circumstance that the account, as finally stated, exceeded the appropriation, does not tend to vitiate the agreement. The claim of the plaintiffs is not to be defeated because they did not complete the reservoir, if they were bound to do so, as they were ordered to desist. As between individual contractors, the builder would confessedly recover for his work up to that point; perhaps, also, for profits he might have made. The only distinction between the claim of these plaintiffs and of individual contractors, in such a case, is that the recovery here is limited to what remained of the appropriation.

I am of opinion that the act of 1875 (*L.* 1875, ch. 258), which authorized the city to issue its bonds to the amount of \$500,000 for the completion of the reservoir, was a ratification of the prosecution of the work.* The legislature recognized the existence of the reservoir in its unfinished condition, and made provision for its completion.† This proposition is not affected by the fact that the bonds were not issued or the duty to issue them imposed in absolute terms.

The questions as to the supposed obligation of the plaintiffs to return money received, and as to the effect of voluntary payments, need not be considered.

After a careful examination we think that none of the exceptions were well taken.

As to the appeal of the plaintiffs, we have only to say that the provision of the code giving an appellate court power to reverse, affirm or modify a judgment appealed from, involves a limitation and does not au-

* To same effect, *Hasbrouck v. Milwaukee*, 21 *Wisc.* 217, 235.

† As to uncompleted work, see *Penn Township v. Perry Co.*, 78 *Penn. St.* 457.

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thorize the increase of the judgment. We are of opinion that the power of an appellate court, as it had previously existed, has been restricted and qualified by that statute. The question is of great moment, and we do not feel at liberty to give the statute the construction claimed in support of this appeal. The judgment and order appealed from must be affirmed with costs.

MCCUE, J., concurred.

REYNOLDS, J. [Dissenting].—As I do not concur in the decision to be given in this case, it is, perhaps, proper that I should make a brief memorandum, stating in general terms the ground of my dissent.

The only authority for the construction of the work upon which the plaintiffs were employed, is to be found in the act of 1871, which provides that "it shall be the duty of the permanent board of water and sewerage commissioners of the city of Brooklyn, to proceed to carry into effect the plan for furnishing an increased supply of water for said city, and for such extension of the present water-works of said city, and for the construction of such further reservoirs, conduits, and other structures, as may be necessary for that purpose, heretofore submitted by said board to the common council of the city of Brooklyn, and approved by a resolution of the board of aldermen of said city on the eleventh day of July, 1870, *provided, the whole expense thereof* shall not exceed the sum of one million four hundred thousand dollars," etc. To that end, the said board is authorized to acquire in the name of, and for the city of Brooklyn, title to such lands, ponds and streams, as may be necessary therefor, and upon the acquisition of the same to "cause the necessary work, to carry said plan into effect, to be done."

It is plain that "the whole expense," which is not to exceed the specified sum, is the entire cost, not only of acquiring the necessary lands, ponds and streams,

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but of constructing and *completing* the works authorized by the act. The plans referred to are to be "carried into effect," and unless the law be so construed as to require the finishing of the works within the limits prescribed, the proviso would be made of no effect.

The bearing of this will very shortly appear.

At the time the contract with plaintiffs was entered into, certain expenditures had been made out of the amount authorized and appropriated as above stated, including the sum of \$110,000 for lands, ponds, and streams designed for the reservoir. When the plaintiffs entered into their contract, they were bound to take notice of the limitation upon the power of the city to contract with them, and of the condition of the fund at that time. They could not bind the city by any engagements contravening the law under which its officers and representatives acted. If the contract had stipulated for a gross sum as plaintiffs' compensation for the construction of the reservoir, and that sum had been in excess of the appropriation, or of the part thereof then at disposal, thus in terms disregarding the limitation, it would have been illegal and the plaintiffs could not have enforced it.

Instead of that, it provided for the performance of certain itemized work at detailed prices, subject to the directions of the engineers of the water board. It also provided for extra compensation for haulage beyond a given distance, an item which turned out to be over \$100,000 (See 23rd and 25th findings of referees), and for modifications and changes by the chief engineer during the construction of the work (See 15th finding).

It is obvious that under a contract so elastic, the possibilities were unlimited. The plaintiffs, having contracted upon these terms, are responsible for the natural results that flow from them. According to the findings of the referees the results are these: The plaintiffs have already performed work and furnished

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materials, under and in pursuance of the contract, to the amount of \$1,261,937.69. They have been paid on account, the sum of \$1,094,137.92, leaving unpaid to the plaintiffs, on account of the work, the sum of \$167,799.77. There remains unexpended of the appropriation, only \$107,837.25, not enough to pay the plaintiffs by about \$60,000, and yet, when the plaintiffs were stopped, the following work remained undone or incomplete, viz: Forty-seven acres of land within the original water area was unexcavated; the paving of the slopes of the dam embankment as required by the contract was unfinished; the paving of the slopes of the reservoir had not been done, the ground within the property-lines was not cleared, the ground was not graded where grading was necessary to a regular outline; the work was not left in a neat and orderly condition; the rubbish, shanties and buildings erected during the progress of the work done, were not entirely removed or destroyed (See 29th finding). This work, the referees say, was so left undone or unfinished by reason of the directions given to stop and cease the excavations and the other work, and the action of the common council in taking possession of the work. The ground upon which this was claimed to be done, was that the appropriation was exhausted, and as the referees' report shows, it was high time for the city to have made that discovery. If a contract containing in itself the germs of such fruits, so natural, if not inevitable, can be upheld, because it does not on its face, and in express terms, violate the limiting proviso, then it would be so simple and easy a matter to evade the statute, that the idea of its being a protection to the city was a complete delusion. It was only necessary to itemize the work, and the consequent uncertainties would overcome the resistance of the law.

It is no answer to say that the aggregate has been increased by reason of directions given by any of the

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officers or agents of the city ; directions which they could give, and which the plaintiffs had bound themselves to obey. The power that was given to the city or its representatives was limited by the proviso, and the plaintiffs could not, directly or indirectly, by their contract, put into the hands of the water board or its subordinates, an authority which the legislature had expressly refused to confer.

The referees hold that the plaintiffs must be limited in their recovery to the unexpended balance of the \$1,400,000, so far giving effect to the limitation contained in the law, yet they award the plaintiffs the whole of that balance, leaving a very large and material portion of the work undone or incomplete. In this I think they were in error.

As we have seen, the statute required that the sum of \$1,400,000 should cover the *whole expense* of carrying the work to completion. It seems to me, that it is as much a violation of the statute to use *all the appropriation* for a *part of the work*, as it would be to finish the work and exceed the appropriation. Of course, before the work can be completed a new appropriation must be made, and, in fact, legislative aid has already been invoked to that end. If the restriction in question is valid for the purpose of limiting the plaintiffs' recovery, I cannot see why it should not prevent their recovering at all. By the present judgment the city is compelled to pay the full price of a completed enterprise for an unfinished work which it has upon its hands. To me this looks like nullifying the law.

It is claimed, however, that the act of 1875 ratifies whatever had been done in excess of authority previously given. The section from which this result is argued, is as follows :

"§ 1. Upon the approval of the plans, specifications and estimates therefor, by the common council of the city of Brooklyn, the board of city works of said

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city are hereby authorized to complete the Hempstead reservoir, and for that purpose the said city is hereby authorized to issue such bonds as said common council may deem necessary, not exceeding \$500,000 in amount; and no such plans, specifications and estimates, shall be approved, nor shall such work be done, except upon a stipulation, under suitable penalties, that the work aforesaid shall be fully finished and completed for the sum aforesaid."

This recognizes the fact that the city has an unfinished reservoir upon lands which it owns, and is designed to meet the necessities of the case, by authorizing the city to raise money to complete it. It does not refer, even by implication, to any previous or then existing contracts, and I am unable to see how it can be construed into a ratification of such contracts, or a condonation of their illegality. The law simply regards the physical fact of an unfinished reservoir on city lands, and the absence of a fund to complete it. I have said it does not refer to contracts already made by the city. Perhaps, however, the latter part of the section, exacting a stipulation under penalties, that the work "shall be fully finished and completed" for the sum specified, was prompted by the fact that a former limitation had proved ineffectual. But this can hardly be considered a ratification of what the legislature was now attempting to prevent the repetition of, by additional guards.

With this view of a controlling principle in the case, it is not needful to discuss any of the other questions, especially such as might relate only to the amount of recovery.

Finding myself not in accord with my brethren, nor with the report of the referees, I must, of course, distrust my conclusion; and yet it appears to me so inevitable that I feel compelled to adhere to it, unpleas-

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ant as it is to differ from the weight of authority that goes with the judgment in favor of the plaintiffs.

NOTE ON MUNICIPAL CONTRACTS.

I. *Necessity of inviting proposals* (see p. 1).

The obligation to let to the lowest bidder does not exist unless imposed by express law, nor even then, according to the better opinion, is it an inflexible rule to be applied against public policy, upon a literal construction of the act, and beyond its apparent intent. The following recent cases, and the authorities referred to in them, illustrate the question:

Matter of Dugro, 50 *N. Y.* 513 (1872, opinion by ALLEN, J., all concurring). Although the charter of New York requires all work (over \$1,000) to be let by contract to the lowest bidder, yet the ancient power of the city over the streets must not be impaired by doubtful construction; and if the city desire to use a patent pavement, the fact that advertising for bidders became necessarily an empty form, does not affect the validity of the contract.

To same effect, *Hobart v. City of Detroit*, 17 *Mich.* 246, 253, opinion by COOLEY, Ch. J.

Bennett v. City of Jefferson, 21 *La. Ann.* 143 (opinion by HOWE, J., 1869). The city of Jefferson has the right—under its general powers, conferred in the usual form, to control and improve streets, and raise the expense by tax or loan,—to lay a patent pavement; but when it proceeds under a clause allowing property owners to petition for an improvement to be made partly at their expense, provided that such work shall be done by contract by the lowest bidder, then they cannot adopt a patent pavement, for this precludes all real competition. The court say that the New York and Michigan cases rest on public policy, under a statute, which if literally pushed to the extreme, would cut off the cities from any patent however desirable.

Yarnold v. City of Lawrence, 15 *Kans.* 126, 131 (1875, opinion by BREWER, J., all concurring). Where the only provision of law as to advertising was, that before any contract for street improvements should be let, the city engineer should make and submit to the council an estimate of cost, and that in advertising for bids such estimate should be published (without expressly requiring advertising): —*Held*, that the city might contract without advertising; and if they advertised, were not bound to accept the lowest bidder.

County commissioners who are required by law to let to the lowest

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bidder, have no authority to proceed without making any plans, and require each bidder for the erection of a bridge to accompany the bid with his own plans and specifications, adopting such plans as they see fit and accepting the bid accompanying them, without giving others an opportunity to bid on the plans; and a contract awarded on such a letting, was held void, as opening the door to corruption, favoritism, and fraud. *People v. Commissioners*, 4 *Neb.* 150. In this case a statute providing that the commissioners may let to the lowest bidder was held mandatory.

Section 123 in the charter of Elizabeth of 1863,—which directs that all contracts for doing work, or furnishing materials for public works, exceeding \$100 in amount, shall be advertised, and given to the lowest bidder,—is inconsistent with a resolution of the common council to use the Stow foundation pavement, and advertising for proposals for the same; because it is patented, and one firm has the exclusive right to use it in the city. *State v. Elizabeth*, 35 *N. J.* 351.

Where the common council of a city, having advertised for bids for paving a specified distance, subsequently entered into a contract with the lowest bidders to pave a portion only of the distance, “or further if ordered,” and after that was completed, ordered the remainder to be done by the same contractors,—*Held*, that the whole work was covered by the original contract, and it was not necessary to advertise for proposals a second time for the completion of the latter portion of the work. *Brevoort v. Detroit*, 24 *Mich.* 322.

Proposals for a public contract, and an acceptance of them by the government, may be held to constitute a complete contract, although they contemplated that a written agreement should be subsequently executed, which was not done. *Adams v. United States*, 1 *Cl. of Cl.* 192.

Under 1 *L.* 1870, p. 876, § 13,—which authorized the commissioner of public works of New York to cause water meters to be placed in certain establishments for the purpose of ascertaining the water rate,—the commissioner has power to contract independent of the requirements of the charter (*L.* 1870, p. 386, § 104), passed shortly before, requiring contracts made or let by the heads of departments to be by public proposal. *People ex rel. Navarro v. Van Vorst*, 64 *Barb.* 205. *S. P.*, *Greene v. Mayor, &c. of N. Y.*, 60 *N. Y.* 303; *rev'g* 1 *Hun*, 24.

“It is a sufficient objection to a naked unexecuted contract made by an officer of the government, that he has neglected to comply with the provisions of an act of congress which requires that advertisement for proposals shall precede the letting of the contract. But, after a party has entered into a contract with the government in good faith,

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and has so far performed his part of it, that to rescind it or declare it illegal and so incapable of execution, would subject him to loss and injury whilst the government would yet enjoy the benefit of his labor or expenditure, I do not think that such an irregularity can be set up against it. To allow the government, after it has derived the benefit of a man's work or expenditure, under an honest contract made by a public officer within the scope of his authority, to avoid payment or to change its terms to his injury, on the technical ground that the contract was made without advertising for proposals, would be a far more intolerable violation of law than the neglect to obey the statutory direction. The magnitude of the injustice which such an application of the law would work, necessarily cures the original defect upon the maxim *feri non debet sed factum valet*. See also opinion Attorney-general Cushing (6 *Opin.* 406). This principle is so obvious that it needs no other authority for its support than that which it finds in every honest man's conscience." Atty.-Gen. Bates, 10 *Op. Att.-Gen.* 422. Compare to the contrary, *Donovan v. Mayor, &c.* of N. Y., 33 N. Y. 293; rev'g 44 *Barb.* 180; *Kingsland v. The Same*, 5 *Daly*, 448.

As to changes where bids are required, see p. 2, *ante*, note.

II. *Power to make changes in the plan or in the work* (see p.).

In the case of the Milwaukee harbor, the statute authorized the city to construct a harbor, and required the common council to file accurate plans and let the contract to the lowest bidder; and authorized them, after popular vote, to issue bonds therefor to the amount of \$50,000. The contract reserved the right to the city to direct alterations or extra work. The city subsequently modified the plan, increasing the cost far beyond \$50,000, and thereafter the legislature authorized them to issue such amount of bonds as might be necessary to complete the harbor, and this act the city accepted. *Held*, that it ratified their previous conduct in altering the plan. *Hasbrouck v. Milwaukee*, 21 *Wis.* 217, 235.

In the Rochester Sewer case, the commissioners of public works of Rochester passed an ordinance for "deepening and enlarging of Platt street sewer from, &c. to, &c. by enlarging that portion under said mill, constructing the tunnel under the race and deepening that portion of the sewer in Mill street and Platt street, to the west line on said street, said sewer to be not less than 7 feet square, and an arch cover, except that portion which is tunneled, and to be at least 25 feet deep at State street, &c.;" and ordered an assessment of \$23,000, the estimated expense. They advertised for proposals accordingly, and one Spaulding made an alternative proposal,—one alternative

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being for a sewer through Mill and Platt streets, at \$20 per foot; the other for tunnel under Mill and Platt streets, \$25 per foot. After awarding the contract to him for an open cut and tunnel sewer for less than \$19,000, they reconsidered their vote, and without further advertisement or ordinance awarded him the contract under the other alternative for a tunnel sewer under the streets mentioned. The change increased the expense about \$4,000, but the aggregate was less than the estimate.

The supreme court held that the commissioners' ordinance having provided for a cut or merely deepening of the sewer in the streets named, they could not afterward change the plan and award a contract in the same proceedings for a tunnel sewer, and hence owners of real estate liable to assessment could enjoin the proceedings. 5 *Hun*, 67.

The court of appeals reversed the judgment, holding that as the general purpose of the ordinance was for a sewer, the board had ample authority to contract in a mode different from that first adopted, although it increased the expense, especially as they did so on petition of parties liable to be assessed. 1876, Op. by MILLER, J., all concurring, *Lutes v. Briggs*, 64 *N. Y.* 404; rev'g 5 *Hun*, 67.

A preliminary estimate of the cost of a street improvement, made for the purpose of determining who is the lowest bidder, will not prevent the city from assessing a larger actual cost on the property benefited, where the discrepancy is without fraud. In such assessment, the cost of necessary surveying and improvement certificates, collection expenses, and interest may be included. The fact that a penalty to be incurred by the contractor for delay, has not been exacted from him, to reduce the cost of the improvement, will not invalidate the assessment, when the facts are such that the proper city officers may have honestly determined that such penalty ought not to be enforced. *State v. Town of Guttenburg*, 38 *N. J.* 419.

The inhabitants of a town voted to build a town-house according to a plan and specifications agreed upon, and appointed a committee to contract for and superintend the erection of the same, "with power to make any slight alterations in the plan, which should in their wisdom be deemed just and proper." *Held*, that whether the authority given to the committee to make such slight alterations would justify them in employing an architect to draw plans for the purpose, was a question for the jury. The court in effect *held*, that if the intent of the resolution was to authorize them to modify the exterior, or the expenditure therefor, they might employ plaintiffs. *Upjohn v. Taunton*, 6 *Cush. (Mass.)* 310.

A municipal contract providing that the work shall be done under

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the direction of a city officer, implies that such officer may direct in regard to variations rendered necessary by the action of the city authorities. A consent to vary need not be by resolution, but may be implied. *Messenger v. City of Buffalo*, 21 *N. Y.* 196.

A municipal corporation forbidden by law to make any additional allowance beyond the legal claim under any contract with them, may nevertheless waive a forfeiture incurred by a contractor by not completing performance by the day named in the contract. *People ex rel. Cunningham v. Brennan*, 18 *Abb. Pr.* 100.

The plaintiff agreed to do the cutting and filling necessary to reduce a street to a certain grade, under the direction and supervision of the defendant's engineer. *Held*, that the contract referred to the decision of the engineer in determining the manner in which the work should be done, and that, if by his direction the plaintiff blasted to below the required grade, and then filled up to it, the city were to pay for all that work. *Blake v. Dubuque*, 2 *Iowa*, 492.

Where an application was "for re-opening a communication between Albemarle sound . . . by the construction of a break-water," Attorney-general Cushing advised that the breakwater was but an incident or means, and the appropriation could be used without reference to whether a break-water was constructed or not. 6 *Op. Att.-Gen.* 19.

In the case of the Milwaukee harbor, *held*, that under the power of the harbor committee and city engineer to oversee and direct as to the best manner of executing the contract, a "protection work," so-called, and apparently necessary to the economical building of the harbor, was within their power to direct, and the city were liable for a *quantum meruit*. *Hasbrouck v. Milwaukee*, 21 *Wis.* 217, 235.

Where a charter authorized the city council to construct sewers of such dimensions as *they* should prescribe by ordinance,—*Held*, that an ordinance authorizing the construction of a sewer, "to be of such dimensions and of such materials as may be deemed requisite by the city engineer," was invalid. *St. Louis v. Clemens*, 43 *Mo.* 395.

So, where a resolution of a county board of supervisors for the removal of the county seat, provided "suitable guarantees" should be given for the erection of county buildings at the new location, free of cost to the county, was passed by a two-thirds vote as required by law, and the next day the approval of the guarantees was referred to a committee of the board by a majority, but not a two-thirds vote,—*Held*, that the resolution could not operate as an absolute authority for removal, until the condition was performed and suitable guarantees given, and that the board could not thus, by a mere

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majority, delegate its powers to determine what was suitable; and that, notwithstanding an acceptance of guarantees by the committee, the original resolution remained as conditional as when passed. *People v. County Officers of St. Clair*, 15 *Mich.* 85, 18'6, opinion by CHRISTIANCY, J.

Sections 62 and 64 of *L.* 1843 (*R. S. Ind.* c. 16),—which authorizes boards of county commissioners to enter into contracts in writing for building bridges over watercourses, and to appoint one or more persons to superintend the same,—do not empower such commissioners to appoint agents to make such contracts. *Potts v. Henderson*, 2 *Ind.* 327.

Where a contract is to deliver a specified quantity of lumber to the government, and the words "more or less" are added, with no reference to any other method of determining more exactly the quantity intended, or removing the uncertainty, the parties will be held to a quantity approximate to that named, allowing only a variation reasonable under the circumstances. But when the words "more or less" have a reference to something by which the exact quantity intended can be ascertained, and the uncertainty removed, then the words will limit or extend the quantity named to that which may be ascertained and determined by the reference. *Brawley v. United States*, 11 *Ct. of Cl.* 522. Compare *Harrington v. Mayor, &c. of N. Y.*, 10 *Hun*, 248.

The power vested in the head of an executive department of the government, to make contracts for work or materials for the government, does not imply power to rescind or alter such contract when made. 9 *Op. Att.-Gen.* 80.

Where the employer reserves to itself in the contract, the privilege of changing the plan, its making such a change does not necessarily entitle the contractor to cash payment in lieu of the mode prescribed by the contract. *Hasbrouck v. Milwaukee*, 17 *Wis.* 266.

Power of the street superintendent to enlarge the time for the completion of a contract for street improvements. *Conlin v. Seamen*, 22 *Cal.* 546; *Houston v. McKenna*, *Id.* 550; *Taylor v. Palmer*, 31 *Id.* 240.

A building contract in writing contained a stipulation, that the employer reserved the right of making alterations in the plan of the work during its construction, the expense of which should be agreed on at the time; but that no extras should be allowed for, under any pretext whatever. *Held*, that the employer was not liable for the increased cost of the work, occasioned by alterations made by the builder, to which the employer assented, where there was no bargain as to the price of such alterations, according to the terms of the

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contract, and no express promise proved to pay the value of such work. *Miller v. McCaffrey*, 9 *Penn.* 245.

If a contract with a railroad company for constructing its road provides that the contractor shall not deviate from the contract, nor receive any pay for extra work, unless a written order for the same is made and signed by the engineer, the contractor cannot recover for extra work done on the verbal order of the engineer, even if there is another clause in the contract which provides that the engineer may direct alterations in and additions to the work. *White v. San Rafael, &c. R. R. Co.*, 50 *Cal.* 417.

In an action to recover for labor and materials furnished under a contract to build four houses, which were destroyed before completion by the falling of a stone wall on another part of the defendant's lot,—*Held*, that the contract itself implied an undertaking, on his part, that the place chosen was free from danger, unless the plaintiff had assumed the risk of danger from the condition of the property. If the loss was occasioned by an accident that could have been prevented by reasonable care, skill and expense, it should be borne by defendant. *Sinnott v. Mullin*, 82 *Penn. St.* 833. Compare *School Trustees of Trenton v. Bennets*, 27 *N. J. L.* 513; *Dermott v. Jones*, 2 *Wall.* 1.

Where a contract provided that the claimants shall erect shops, sheds, &c., for the defendant's workmen "on the written order and under the direction of the party of the second part," (the supervising architect of the treasury),—*Held*, that it was not enough, in an action on the contract, to allege that certain barns, boarding-houses, &c., were erected for the defendant's workmen, "with the full knowledge and consent of the officers of the United States, and upon their requirement, and were necessary," &c. *Dix Island Granite Co. v. United States*, 12 *Ct. of Cl.* 624.

Plaintiff claimed to recover for rock excavation made outside the lines of the street, in sloping the sides, which the referee found to have been necessary to effect the excavation within the street. *Held*, that the outside excavation was not included in the contract, and as it was only necessary as a means for accomplishing the work contracted for, plaintiff was not entitled to recover therefor. *Voorhis v. Mayor, &c. of New York*, 62 *N. Y.* 498.

A made a contract to execute certain "excavation, refilling and repaving," for B, and B agreed to pay as a "compensation for such excavation, refilling and repaving," as follows: "for executing the digging" and refilling, seven cents per cubic yard; and for repaving &c., four cents per square yard. A considerable portion of the work was through hard-pan and rock, worth from seventy-five cents to one

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dollar per cubic yard; while seven cents was the lowest price for excavating common earth. *Held*, nevertheless, that A could recover nothing beyond the contract price, and that extrinsic evidence was not admissible to prove the value of excavating hard-pan and rock. *Sherman v. Mayor, &c. of New York*, 1 *N. Y.* 318.

The plaintiff entered into a written contract to make excavations, and commenced work, but afterwards gave notice to the defendants that he could not go on at the price named in the contract, and must abandon the work unless defendants would allow him more than the contract price for a portion found extra difficult. The defendants told him to quit that portion of the work until some arrangement could be made in regard to it; and the plaintiff did quit it for about two weeks, when it was resumed under a new agreement, by which the plaintiff was to receive a reasonable compensation for excavating the hard material. *Held*, that this was such a rescission of the original contract in respect to that portion of the work, as would have precluded the defendants from maintaining an action to recover damages for its non-performance, afterwards. The new agreement was binding, and must control. *Hart v. Lauman*, 29 *Barb.* 410.

Where the plaintiff contracted in writing "to excavate and build a good, firm, and substantial sewer," specifying particularly the prices to be paid for "all the excavation, whether hard-pan, quicksand, caves or otherwise, and "for the blasting and removing of rocks," and claimed in this suit extra payment above the contract price, which he admitted had been paid,—*Held*, that no evidence was admissible to show that extra work had been done, or to show that it was rendered necessary by the discovery on the line of the sewer of a kind of rock not before known in New York, and much more difficult of removal than those usually found, and of a quality which could not possibly have been contemplated in making the contract. *Devlin v. Mayor, &c. of New York*, 4 *Duer*, 337.

The original plan for a piece of work was abandoned, and a new one adopted, which increased the expense to such a degree that the original plan could not be followed as a guide, even to the extent of the expense estimated on such original plan. The contractor, in making his estimates, acted under the directions and with the knowledge of the employers. *Held*, that it was not necessary for the contractor, in order to recover, to show what work and materials were embraced in the original contract, and what was extra work. *Hasbrouck v. Milwaukee*, 21 *Wis.* 217, 235.

III. *Ratification or estoppel* (see p. 5).

§ The general principle of implied contracts, and of ratification by express assent, or by acts or conduct inconsistent with any other

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supposition than an intent to adopt and own the act, is equally applicable to municipal corporations as to individuals (*Peterson v. Mayor, &c. of N. Y.*, 17 *N. Y.* 453; 1 *Dill. Mun. C.* § 385), except where it is invoked to supply an absolute want of power in the corporation. The distinction is this:—Want of power in the officer cannot be supplied by an estoppel against the officer, nor by a ratification by him; and want of power in the corporation cannot be supplied by estoppel against it or ratification by it. But if the corporation had power, want of its delegation to the officer may be supplied by estoppel or ratification drawn from the conduct or silence of the corporation. See *Rady v. Mayor, &c. of N. Y.*, 20 *N. Y.* 312.

The foundation of the exception is that statute restrictions and inhibitions cannot be evaded by resorting to estoppel by assent of officers, &c. *McDonald v. Mayor, &c. of N. Y.*, 63 *N. Y.* 23; *Inhabitants Weismer v. Village of Douglas*, 64 *N. Y.* 91. Unless the city has actually collected the fund which equitably belongs to the contractor. *Nelson v. Mayor, &c. of N. Y.*, 63 *N. Y.* 535; rev'g 5 *Hun*, 190. Where it had power to act, a municipal corporation may estop itself like other parties to a contract. *County of Randolph v. Post*, 93 *U. S.* (3 *Otto*) 502, 518, and cases cited. Even the State and its agents may be estopped. *Peck v. Burr*, 10 *N. Y.* 294.

The distinction is, perhaps, best illustrated in two recent California cases. In *Argenti v. San Francisco*, 16 *Cal.* 255; cited in 63 *N. Y.* 544 (1860, opinion by COPE, J., and FIELD, J., concurring in the result), it was held that a municipal corporation having had the benefit of a contract for work and materials, could not, in an action founded on the contract, contest its validity, on the ground of want of delegated authority in the officer who made the contract. The court conceded that an executory contract made without authority cannot be enforced, but say that a different question arises where the contract has been executed and the corporation has received the benefit of it. In such a case they held that the law interposes an estoppel and will not permit the validity of the contract to be called in question. It appeared in that case that the improvements,—the grading and planking of certain streets,—were constructed for the exclusive benefit of the city and its inhabitants; that they were of valuable and permanent character, and constructed in pursuance of contracts entered into with an officer of the corporation in his official capacity; that in making the improvements reliance was placed on the validity of these contracts, and the obligation of the city to pay as provided, and that the improvements were made under the immediate supervision of an officer of the city government, and when completed were approved of and received by him on behalf of the city; that the

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city authorities were fully informed of the facts, and took no steps to repudiate the contracts or enlighten the plaintiff as to the disposition of the city to pay, until the city had received all the benefit to be derived from their performance.

Held, that although there was no evidence that the agent who signed the contracts was expressly authorized to do so, the knowledge and silence of the city authorities was equivalent to a direct sanction (reviewing and relying on the New York and California authorities).

FIELD, J., was of opinion that as the charter vested in the common council the authority to order the improvements, and a general ordinance had designated the officer under whose supervision on behalf of the city the work should be done, and an ordinance had indicated an intent of the common council to make the improvements, and advertisement was made, proposals received, and the work awarded, the question whether the officer executing the contract on the part of the city had authority, was of no moment; the contractor, having performed as if there had been a formal contract, could recover.

In *Zottman's case*, 20 Cal. 96 (1862, opinion by FIELD, J., COPE, J., concurring), held that where a charter prescribes a mode in which all contracts shall be made, by ordinance requiring bids, a contract made in any other way cannot be made valid by ratification or acceptance of the work. In this case, a construction contract having been made, the superintendent under whose supervision it was required to be performed, and the special committee of the common council to whose satisfaction it was to be completed, found that extra work would be necessary, and accordingly ordered it in presence of various members of the city government, and the work was done to the knowledge of the common council.

Held, that no ordinance authorizing the extra work having been proved, the contractors could not recover for it. Their employment with knowledge of the common council, and the fact that the corporation had received the benefit, could not create liability against the statute.

This conclusion was established by FIELD, J., in accordance with his views in *Argenti v. San Francisco*, 16 Cal. 255, and (in so far as the two are inconsistent) overruling that case with the concurrence of COPE, J., who withdrew from his former opinion and concurred with FIELD, J.

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BIGLER v. MAYOR, &c. OF NEW YORK.

*N. Y. Supreme Court, First Department; Circuit,
June, 1877.*

NEW YORK CITY GOVERNMENT.—DEPARTMENT OF DOCKS.—CONTRACTS WITH MUNICIPAL CORPORATIONS.—QUANTUM MERUIT.

The department of docks in the city of New York,—like those of police, fire, public works, finance, board of education, and charities and correction,—is an independent government.

Contracts to be entered into by the dock department are governed by the organizing law of that department, and are exempt from restrictions contained in the charter relating to other departments.

Where an act, regulating the work of a construction by a municipal contract, requires a contract in a specified form to be awarded on advertising for proposals, with plans and specifications, unless ordered to be otherwise performed by a vote of the board, by a specified majority—the board exhaust their power to dispense with advertising for bids, &c. by a single vote, adopting one system in regard to any particular part, and the other in respect to the residue. Having once designated the mode, their power of designation is gone.*

Hence, if under such a provision, the department has directed a work

* The power of a board of supervisors, under the statute allowing them to apportion taxes among the towns, "as shall seem to them to be equitable and just" (1 *R. S.* 5 ed. 848, § 3, subd. 2), is not legislative, but acting under a law already made; it is judicial in its nature, and, therefore, they have no power to reconsider their action, once taken and duly recorded. *People ex rel. Thomson v. Supervisors of Schenectady*, 35 *Barb.* 408. Compare *People ex rel. Hotchkiss v. Supervisors of Broome*, 65 *N. Y.* 222, 227.

At a subsequent meeting a city council reconsidered and rescinded an order in which a person had an interest. In a suit by him,—*Held*, that the jury were authorized to presume, there being no proof to the contrary, that there was a standing rule making a reconsideration proper, and therefore that the action of the council was under it, and correct. *Red v. Augusta*, 25 *Ga.* 386. *So held*, especially as it did not appear that the first action of the council was communicated, and led the other party to make expenditures or engage in new operations.

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to be constructed by days' work, as far as the labor is concerned, and by contract, as far as the material is concerned, it has designated the way in which the work is to be performed, and cannot exceed it.

The act (L. 1870, p. 910, c. 383, § 36),—which provides that "the work of such construction, under said plan or plans, shall be performed by contract,"—means, by "work," the whole structure; not merely the labor, but also the materials.

A resolution, ordering a structure to be built without contract, dispenses only with contract as to labor, and precludes the board from subsequently dispensing with contract in respect to materials.

Where the only provision for forfeiture imposed upon the contractor was that the city might deduct from any thing that might be due to the contractor for furnishing material, whatever such material would cost, if through the contractor's default the city bought the lacking materials in the market;—*Held*, that there was no contract, as the city was not bound to order, nor was the contractor liable for omitting to furnish anything.

Where a contract, required by law to be made in accordance with advertised specifications, was general, specifying certain qualities of various kinds of material required, but no quantities whatever,—*Held*, that it was void, because, for the lack of specification of quantity, there could be no real competitive bidding.

Where materials supplied to a municipal corporation for a public work, are required by law to be furnished by contract made on advertisement for bids, recovery therefor must be upon such a contract, and cannot be had on the ground of *quantum meruit*.*

Motion to dismiss complaint.

This action was brought by James Bigler, William

Where a city corporation passed a resolution directing a sum which had been reported by arbitrators for extra work by contractors, to be paid,—*Held*, that this was an acknowledgment, on the part of the corporation, of an indebtedness to that extent, and a promise to pay it, and that, after being assented to by the contractor, it became binding upon the corporation, and could not be rescinded except by mutual consent. *Brady v. Mayor, &c. of Brooklyn*, 1 *Barb.* 584.

For other illustrations of the doctrine of *functus officio*, see *Bloomer v. Waldron*, 3 *Hill*, 361; *People ex rel. Brown v. Woodruff*, 32 *N. Y.* 355; *Filkins v. Brockway*, 19 *Johns.* 170; *Mayor, &c. of N. Y. v. Butler*, 1 *Barb.* 325; *Mechanics & Mfg. Bk. v. Cowden*, 3 *Hill*, 461.

* See p. 48 of this volume.

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Chambers, and George H. Southard, composing the firm of J. Bigler & Co., against the Mayor, &c. of New York, to recover \$66,127, balance due on a contract for furnishing lumber, &c., to the department of docks of said city.

The said contract was made July 29, 1873, between the mayor, aldermen, and commonalty of the city of New York, by the department of docks of said city, and the plaintiffs, by which the latter agreed to furnish the materials specified therein, in such quantities, and at such places in the city of New York, as might be required by the former, as follows ;

“White Pine Plank—To average forty feet long, five to six inches thick, twelve inches and upwards wide. Forty-two dollars per thousand (\$42 per M.).

“White Pine Timber—Twelve to fourteen inches square, averaging forty feet long, sawed on all sides. Forty dollars per thousand (\$40 per M.).”

And so on, for nine more different kinds of timber, but without specifying the quantities, nor the whole amount to be paid for each.

The instrument then continued as follows :

“This contract to continue in force for the term of twelve months from the date of the execution hereof.

“In default of the parties of the second part to furnish any material called for, by requisition of the party of the first part, under this contract, then the party of the first part to have the right to purchase in open market, the material called for in such requisition, and the excess of cost, if any, to be deducted from any money due the said party of the second part, by the party of the first part.

“All materials delivered by the parties of the second part, to be subject to the inspection and approval of the superintendent of repairs and supplies of department of docks.

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"Payment for materials furnished, under this contract, by the parties of the second part, to be made by the comptroller of the city, upon the requisition of the party of the first part.

"In witness whereof," &c.

The advertisement for proposals and the offer of plaintiffs to furnish corresponded to the items in the contract. The plaintiffs gave requisite bond with sureties for carrying out the contract.

The following is a copy of a requisition issued to the plaintiffs under the contract :

"PLEASE RETURN THIS ORDER, WITH RECEIPT AND BILL (IN DUPLICATE),

"To the Book-keeper, at the Office of the Department of Docks, 346 and 348 Broadway.

"New York, 31st March, 1874.

"MR. BIGLER & Co. :—Please deliver, Pier 34th St., N. R., 22,000 ft. face W. P. Plank, 5 in. thick, 12 in. and upwards wide, to average 40 ft. long. Forty Spruce Plank, 4x10, 24 ft. long, for and on account of the Department of Docks.

W. BUDD, Treasurer.

"No. 3,533.

WM. W. BURNHAM, Book-keeper.

"Requisition 1,645. March 30, 1874—TURNER."

The others were similar in form, and covered the balance of the materials included in the action.

The cause was tried at circuit.

The resolution of the dock department, relied on by plaintiffs, was proved by oral testimony to the effect that the piers were ordered to be built by the unanimous vote of the board. The labor was done by day's work, the materials were furnished by contract.

No vote of the board was taken on making requisi-

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tions under the contract. The plaintiffs offered to prove that all work and materials which had been furnished otherwise than by contract be approved, and that thereafter work and materials be furnished without contract. This was excluded.

After several witnesses had been examined on behalf of the plaintiffs, it was agreed between the counsel for the respective parties, that defendants, for the purpose of raising the question of the validity of the contract by a motion to dismiss the complaint, and for the purpose, if possible, of shortening the trial, might introduce in evidence certain ordinances of the common council,* after which a motion for a non-suit should be made, and if it was denied, that then plaintiff's counsel might call other witnesses before resting.

This having been done, the following opinion, in which will be found the other material facts, was rendered by the justice before whom the case was tried.

E. L. Fancher and Dexter A. Hawkins, for the plaintiffs.

William C. Whitney, Charles P. Miller & E. H. Lacombe, for the defendants.

VAN BRUNT, J.—In view of the magnitude of the interests which are necessarily involved in this case, it may not be improper for me to state a little more in

* As to the mode of proving municipal ordinances, see L. 1878, c. 219, which is as follows: "Any act, ordinance, resolution, by-law, rule or proceeding of the common council of a city, or of the board of trustees of an incorporated village, or of a board of supervisors of any county within this State, and any recital of occurrences taking place at the sessions of any thereof, may be read in evidence on any trial, examination or proceeding, whether civil or criminal, either from a copy thereof certified by the clerk of the city, village, common council or board of supervisors, or from a volume printed by authority of the common council of the city or board of supervisors of the county."

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detail than usual the considerations which have led me to the conclusion which I have come to upon the motion to dismiss the complaint in this case. We find that the government of the city of New York is made up of a series of independent departments, none of which are answerable to any given head, and are supreme to a very great extent within the range of duties which are confided to them for execution. We find a police department, a fire department, a department of public works, department of docks, finance department, board of education, commissioners of charities and correction, and I don't know but what there are more of the departments in the city of New York which are entirely independent governments in themselves, governed by certain rules which are applicable to each individual department, and which have no relation to one another, and not answerable to any other department, or any one official head.

[After some remarks upon the evils of this system, the learned judge continued as follows :] Among those departments is the department of docks. We find that the department of docks has certain duties which are confided to it, namely, the construction of the piers and bulkheads of the city of New York, which are necessary for the commerce of the city. They have also confided to them the repairing of piers and bulkheads, and the dredging out of slips, and at the time this new department was instituted, it was intended that there should be a new plan, or a permanent law for the improvement of the water front of the city, devised. As a result of that idea, when the department of docks was first instituted, that plan was infused into the system of the department of docks. I think it was under the charter of 1870,* that such a department was brought into existence. It had then very limited

* 1 L. 1870, p. 373, c. 137, §§ 80, 99.

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powers, and it derived all the powers which it had, from the commissioners of the sinking fund, who could devolve upon the commissioners of docks such powers as they saw fit, for the purpose of carrying out the intention for which it was organized.

We find that within a month after that, in the same year, a new, separate, and independent act was passed* which brought the department of docks from this infantile condition into a full-grown department, and we now see entirely new duties confided to that department. They were made an independent department, consisting, if I recollect right, of five members. They were to have control, not only of the repairing of the old works in relation to the docks and bulkheads, &c., in the city of New York, but were to organize a definite plan for the carrying on of those improvements, whereby the water front of the city of New York might be so improved that it could accommodate the increasing commerce of the city. They were required to adopt a plan for the carrying on of this new work. That plan was to be submitted to the commissioners of the sinking fund, and when it was approved by them it was to be the plan according to which the improvement of the water front of the city of New York was to be conducted. We find, from the evidence in this case, that a plan was adopted by the dock department and submitted to the commissioners of the sinking fund, and adopted by them, and it was called the new plan ;—that the department of docks went to work, doing work of construction under this new plan ;—that in the course of the construction of that work, the department of docks made the contract which is now in suit ;—that in the process of carrying out this alleged contract which was made with the plaintiffs in this action, a large quantity of material

* L. 1870, p. 907, c. 383, §§ 32-44.

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was furnished to the department of docks, which was put into the construction of the docks that were being built under the new plan, as adopted by the department of docks, and approved by the commissioners of the sinking fund ;—that during the running of the contract, material was furnished for the carrying on of that work as it was called for ;—that during the progress of that work, the department of audit refused to pay Bigler & Co. the amount of money which the department of docks had certified to be due to them under this contract, and hence this suit. At the time at which this suit was originally instituted, and the time the answer was first put in, in this case, there was no question raised in regard to the legality of the contract. [Some discussion as to the decision on a former trial is here omitted, because it proved not material to the question now decided.]

Subsequent to the hearing of the case at the general term, the complaint has been amended, and the question has been raised by an amended answer, as to the legality of this contract.

The complaint has been amended so as to cover not only a claim under the contract, but a claim on the ground of a *quantum valebat*, and the answer has been amended alleging fraud, and that the contract was illegal and had no legal existence, so as to found any liability upon it.*

That brings me to the consideration of the evidence as relating to that defense. We find the evidence to be this upon the part of the plaintiff. We find that prior to the time this contract was entered into, the commissioners of the dock department adopted a resolution, by which they provided that, as far as the work which was carried on upon the new plan was concerned,

* As to this distinction, see *Kingsley v. City of Brooklyn*, 1 Abb. N. C. 108.

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the labor should be performed by day's labor, and the material should be furnished by contract as far as practicable.

We also find that they have gone on, as I have already said, working under this new plan, making new constructions under this new plan, under that resolution, doing the work by day's work and making contracts for the purpose of purchasing materials. The way in which the materials were furnished to the dock department, under that contract made with the plaintiff, seems to be this: That the engineer-in-chief, or the engineer in charge, certified to the dock department, what material would be wanted—coming within the terms of the contract. We find that then the treasurer of the dock department, if he was present, and if not, one of the commission of the dock department, issued a requisition upon Bigler & Co., and the timber was sent to the place designated by the requisition, and it was there inspected by the official inspector of the dock department, and the timber was accepted as complying with the requisition, both in quality and dimensions, and was then put into these structures by the workmen employed by the dock department. It is to be borne in mind, that this timber put into these docks, consisted, if I understand it right, of that portion of the piers which was above the water, with the exception of the columns, which took the place of piles for the purpose of mooring the ships. Instead of using a single pile, they bound together 10x10 timber, and they were sunk, making piles twenty inches square, and some eighty or ninety feet long. Instead of being a single stick of timber, it was a number fastened together for the purpose of making this sort of a pile.

Upon that state of facts, the counsel of the corporation has moved to dismiss the complaint, and alleged several grounds of dismissal. One was, that upon the

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cross-examination of Mr. Bigler, it has been established that he has not complied with the terms of the contract. That question should not be considered here. I do not think it can be entertained as a ground for a motion to dismiss the complaint, because the evidence itself is of such a character, that it must necessarily be submitted to the jury. There is nothing more analogous to this question, than that of the case of negligence. If there is any dispute on the question of negligence, it must go to the jury. If there is any dispute in regard to the contract being substantially carried out, that is a question for the jury to determine, and not the court. Therefore, that question cannot be considered on this motion to dismiss the complaint.

What are his grounds upon the question of the legality of the contract ?

1st. That no full and minute specifications were made as the basis for the proposals for any of the work.

2nd. That even if the specifications were good, the advertisement was not for doing said work under said plan or plans.

3rd. That the proposals of the plaintiffs were not accompanied by any bonds of the form set forth in the specifications duly executed.

4th. The contract contained no provision as to time within which any work should be done or material furnished,—but simply a time within which the department might make requisition for material. This was simply providing a time within which the commissioners of docks, by their private act, might purchase of the plaintiffs, materials at fixed prices.

5. The contract contained no provision for the retention of at least one-fourth of the contract price until the completion of the deliveries, as security for its performance.

6th. And no provision for the forfeiture of it for

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non-performance. The requisitions were the private act of the treasurer of the department, or such individual commissioner as made a requisition upon the plaintiffs for material.

7th. No quantities annexed to the items of materials in the specifications, nor in the advertisement, nor in the contract.

8th. No quality of material specified in the contract.

Further, it is not in point of fact a contract for the purchase of material made after any advertisement and public letting.

No recovery can be had on bills not proved as having the certificate of Mr. Turner, the superintendent of repairs and supplies, there being no proof of waiver by the department.

In this designation of grounds, it would seem to have been the claim of the corporation counsel that the contract which was made with Bigler & Co., should accord with the requirements of the dock department law. He has raised, however, in his motion for a dismissal of the complaint, another ground, namely, that if it does not comply with the dock department law, and is not governed by the dock department law, it is governed by the general law of the city of New York, regulating the entering into of contracts by the different heads of the department. That ground, it seems, is not at all well taken. I think the regulation of any contract to be entered into by the dock department, is governed by the organized law of the dock department, and is exempt from any restrictions contained in the charter relating to other departments,* because the legislature has been particularly special in determining as to what the laws of the dock department shall contain, and this

* See *Guidet v. The Mayor*. 12 *Hun*, 566, 568.

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must exclude all other legislation relating to that subject.

The answer which is made by the plaintiffs to this position of the corporation counsel, seems to be this, as I understand it. That under the resolution made by the dock department, or which was, as they claim, authorized by the act of 1871, to be made, the dock department, in the doing of this work, and in the purchasing of this material, were not governed by the rules or regulations of the dock department, governing the making of contracts. That by the resolution which they adopted, they were authorized to do this work by the day's work, that they were authorized to purchase this material in any way which they saw fit, and might make a contract in any way they saw fit, and neither the regulations embraced in the revised ordinances, nor the regulations embraced in the act regulating the power of the dock department, apply to a contract made in that way, because they had adopted a resolution certifying that they should do certain portions of the work by contract and certain portions by day's work, and there are no provisions of the dock law that related to a transaction of that description. They also claimed that if there was no contract made, the dock department had a right to purchase this material in open market, and that any orders they gave to Bigler & Co., could be sustained by claiming he was entitled to recover upon the *quantum valebat*, they having been ordered by the dock department in open market, which they had a right to do.

In order to consider these propositions it is necessary to look at the various acts by which the dock department came into existence.

The charter of 1870 * gave them very little power. We find that by the act of 1870,† their powers were

* 1 *Laws of 1870*, p. 373, c. 137, § 99.

† 1 *Laws of 1870*, p. 907, c. 383, §§ 32-44.

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very much enlarged. We find, however, that by that act they were required, as far as the new plan work was concerned, to do all that work absolutely by contract, and the kind of contract which was specified in the act which gave them these additional powers. It was undoubtedly found that such a cast-iron system of contracts in regard to the construction of this new plan work was not that sort of a system which was to carry on the department successfully; consequently, in 1871,* that portion of the law regulating the dock department was amended. Under the act of 1870, that portion of the law which authorized this work of construction under the new plans, read as follows:

“The work of such construction, under said plan or plans, shall be performed by contract, as follows.” It then goes on and designates that there shall be certain specific plans that shall be first made, and then advertisements for proposals shall be made, giving those specifications, and the contract shall be made in accordance with those specifications, and providing for certain other particulars, in accordance with which the contract must necessarily be made. Now, in 1871, as I say, probably it being found that by such a cast-iron contract system it was not possible for the work of the construction of the new plan to be carried on, that portion of the section was amended to read as follows:

“The work of such construction under said plan or plans, unless ordered to be otherwise performed by the affirmative votes of four members of the board, shall be performed as follows.” And then follow the same provisions in regard to the form of the contract and proposals, and plans and specifications as existed in the act of 1870.

In other words, the alteration seems to have been

* 2 *Laws of 1871*, p. 1285, c. 574, § 6.

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that the department of docks could, by an affirmative vote of four out of five members of the board, designate how the work could be done otherwise than by contract, if they thought the necessities of the case required it.

In pursuance of the powers which were granted to them by that act, we find they adopted the resolution which has been testified to by Mr. Westervelt, namely: that they resolved that the work for these piers, at least that, as far as the work upon these piers was concerned, the labor should be done by day's work, and the material furnished by contract. I don't think the necessities of this act require that the general resolution in regard to all the work, was necessary for the board to act upon. They could say: "We will construct the piers in a different way from that which the law requires," because, I suppose, that would be a compliance with that designation; the law does not require that they should construct all the piers in the same way. But I think the construction of this act requires this to be said: that after they have adopted one system of construction in regard to one particular part of the work, their power of designation is gone; that is to say, if they have, under this provision, directed the work to be constructed by day's work, as far as the labor is concerned, and by contract, as far as the material is concerned, they have designated the way in which the work is to be performed, and they cannot exceed it.

Therefore, there cannot be any change, as far as any particular structure is concerned, by the dock department, in the system of work. They must determine how it is to be constructed beforehand, and, having so determined, they must carry out that plan, and construct it in accordance with that plan, whatever it may have been, either according to the law, or according to the plan which they may have determined upon,

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that it shall be otherwise than that designated by the law. We find that under the assessment law of the city of New York, the corporation either has the right to raise the money beforehand and do the work, or do the work and raise the money afterwards. The court of appeals have held, that if they commenced the work in that way, they must complete the work before they attempt to levy an assessment, or if they levy an assessment they must collect it first, and then do the work, and if they attempt to levy an assessment before the work is finished, they having determined that the work shall be done in that way, namely, the assessments levied afterwards, that it is a defense to any proceeding for the purpose of collecting assessments.*

* See *Eno v. Mayor, &c. of N. Y.*, 68 *N. Y.* 214, rev'g 7 *Hun*, 320.

One who furnishes materials, &c., on a contract made without the preliminary certificates or advertisements required by law, cannot recover on the mere ground that the city has had the benefit of them. Though it may be otherwise, if the city has collected, by assessment, the money to pay for them. *McDonald v. Mayor, &c. of N. Y.*, 68 *N. Y.* 23; *Nelson v. The same*, 63 *Id.* 535, rev'g 5 *Hun*, 190.

A county court made an order appointing a commissioner to let the building of a bridge to some contractor who would wait for his compensation "until the amount is received from the State out of the road and canal fund." The commissioner let the contract to A., who entered into a bond which recited the order and contained an agreement "on the part of the county court, as said court," to pay a certain sum when the work was completed, provided that, "if there be not a sufficient amount of the dividend of the road and canal fund on hand, at the time of the completion of the bridge, the said undertaker is to wait on or indulge the said county, by receiving of said county as fast as said funds shall arrive." When the work was completed, A. received a warrant on the county treasurer, "payable out of the road and canal fund." This was assigned to the plaintiff. *Held*, that the plaintiff could look only to the road and canal fund, and could not compel the county to pay out of its own proper funds. *Pettis County v. Kingsbury*, 17 *Mo.* 479.

Contracts for work, the expense of which is to be assessed,—*Held*,

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Now, then, the dock department having determined as to the way in which this work should be done, there is no power of alteration ; they must go on and finish it, they having exhausted the powers which the law gave them.

That brings me to the direct consideration of the question involved in this question. We find the dock department has determined by their action, that the work upon these piers shall be done by day's work, and the materials furnished by contract. Now, what is meant by that ? And there is the only difficulty there is in this case. What rule in regard to the making of contracts, is to apply to a contract of that description ? It will be seen, by an examination of the act specifying the particulars of the contract, what it is necessary the plans and specification should contain ; that it would seemingly be intended to apply to the whole structure, not only to the work, but to the work and material, both. It was claimed on the part of the counsel for the plaintiff, that the use of the word "work," might relate only to the labor, but I don't think any such construction could be placed upon it. The use of the word "work," means the whole structure. When you talk about the work on the piers, to make a contract in regard to the piers, means the work and materials for the piers, for the whole structure, and that seems to be the idea in fixing the regulations as applicable to the contract, for the work to be performed under this contract. Now, by the regulations of the dock commissioners they took the labor out of the act. Did they leave the material in it ? It seems to me they did. It seems that is the only construction which can be placed upon their acts. They are author-

not obligations of the city within the meaning of clauses restricting the amount of its obligations. *Baldwin v. City of Oswego*, 1 *Abb. Ct. App. Dec.* 62.

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ized to take as much as they please out of the contract system. Whatever they leave in the contract system, that is to be governed by the rules and regulations of the law regulating the contracts of the dock department. Unless that is so, there is no provision of law to regulate what contract shall be made by the dock department. The theory of the law is, that there shall be certain regulations in regard to the contract system of the dock department, because they have specified that where the work is to be done by contract, it means the doing of the work and the furnishing of the material, and where it is done by contract it shall be preceded by certain preliminaries, and those preliminaries must be fulfilled in order that the contract shall be a valid one. The law originally required everything to be done by contract. The law of 1871 has said: "You may take out of this contract system whatever you think the necessities of the dock department require." It seems to me that leaves in the contract system that which remains, and which must be construed in accordance with the provisions of the law regulating the contracts of the dock department. Therefore, that would leave this case precisely in this condition, that the contracts to be made must conform to the general provisions of the law regulating contracts to be entered into by the dock department, and that is, that there shall be full and minute specifications for such work. The labor having been taken out, it leaves the material in, and that there should be full specifications for the material to be furnished, and that the advertisement for the procurement of certain materials shall be in accordance with certain specifications, and the proposals for such material shall be sent to the board within such time as is specified by the advertisement, accompanied by a bond; that the board should open the proposals, and examine them, and award the contract to the lowest bidder complying with such

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plans and specifications, and then the contract should contain this provision, that they shall retain one-fourth of the contract price until the completion of the deliveries, as security for its performance, and it shall be in accordance with those plans and specifications.

Now, if that is true, the contract in this case does not accord with the provisions of the law. It may be a curious thing, but the fact is, that in regard to this contract, after it was entered into by Bigler & Co., the city could not have been held for a single dollar, nor could Bigler & Co. have been held for a single dollar. If the city made a requisition for any amount of lumber on Bigler & Co., and they refused to furnish it, they could not be held for a dollar. That is the condition of that contract, and upon my calling attention to the terms of the contract, it will be seen that the contract is particular, to determine what the penalty for default upon the part of Bigler & Co., shall be, and what is it? That the city shall be able to deduct from anything that might be due to Bigler & Co., whatever the material would cost in case they went out in the market and bought it. Suppose, after the contract had been given to Bigler & Co., they refused to furnish a stick of timber, that they could not do it and make any money by it, where would there be any cause of action against Bigler & Co., for any damage that the city might sustain? They could not recover a cent, because there was nothing due them, and suppose he got half way through the contract, and got one-half of his money, and they made an order upon him for lumber, and he said he would not deliver any more, they could not deduct anything from him because there would be nothing to deduct from; therefore, as far as the question of contract is concerned, it was no contract at all. The city was not bound to order, nor were Bigler & Co. bound to furnish, a stick of timber.

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We find, in regard to this contract, that there were no plans and specifications as required by the provisions of the dock law, that the contract was general in every particular, that there was no way in which there could be competitive bidding, for the reason that we find no amount is specified ; certain qualities of timber are specified, but there are no quantities, no amount of any kind specified, so that there could be a comparison of bids. If the contract system is to prevail (and it has been the theory of both the municipal and State governments that it should prevail), it is necessary the contract should be in such a form that there shall be what is called competitive bidding. Without intending to insinuate that anything of the kind has occurred in this case, I call your attention to the classes of frauds which might incidentally and very easily creep into a contract system of this kind. Here we find they specified white pine plank, to average forty feet long, five by twelve, at \$40 a thousand. Suppose the bidder was in collusion with the engineer of the department, he could go to the engineer, and say : "How much white pine plank do you think you will want?" "Well, so much." "Now, I see down here there is some other kind of plank ; how much of that will you want furnished?" "Well, we will want very little of that." What is the result? He puts a high price upon that of which they want a good deal, and a very low price upon that which they want very little of ; and another man bids conscientiously—supposing they want an equal quantity of the same character, and puts reasonable prices to each class of lumber, and he averages his prices accordingly. How are you going to compare those bids? You foot up so many pieces at so much per thousand, and you will find that one will be lower than the other. When it comes to be filled, the first will be found to be an infinitely degree higher than the other, a fact which would be known to the

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officers of the department in consequence of their knowing how the work will be carried on, and what proportion of the timber of the various classes would be furnished. There cannot be any competitive bidding in a contract of that description. It is for that reason that in laws regulating contracts, there has always been a determination upon the part of the legislature, at least, to see that the contract shall be specific in regard to quantities, and unless it is specific in regard to quantities, there cannot be any comparison of bids.

It seems to me that this contract must be governed by the law regulating the dock department, that it does not comply with the dock department law, and that it is illegal and cannot be enforced.

In regard to the question of *quantum meruit*, I have said that could not be considered in this case. It has been claimed that the city of New York has possession of these materials, that it comes within the case of *Nelson v. Mayor*,* which was a case of an assessment that was levied, and the money was in the city treasury to pay it, and the contract was sought to be defeated on the ground that the contract was illegal in consequence of failing to comply with certain requisitions of law. The court in that case held, the city could not get the money to pay the contractor out of the citizens and then refuse to pay the contractor.

How are the facts in regard to this case? These piers were erected. It was offered to be proved, and we must assume the fact, for the purpose of this question, that the city did realize a rental from those piers, but the rental is not money which is raised for the purpose of paying the contractor for the labor and material which he had furnished for the work, and, therefore, it is to be distinguished from the case of *Nelson*

* 63 N. Y. 535.

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2. Mayor. The United States supreme court decided pretty squarely within a short time the question of *quantum meruit*, and that was in the case of a contract with one of the departments of the United States government where certain materials were furnished and certain work done in pursuance of a contract, and there was not any appropriation to pay the contractor, and the provision of the law* was, that there must be an appropriation before the contract could be made. The court of claims allowed the contractor to recover upon the ground of a *quantum meruit*. The supreme court of the United States reversed that judgment, holding that the contract was utterly void; that the contract being utterly void, although the United States had possession of the materials, and was using them, there could not be any recovery on the *quantum meruit*, because the department had no power to incur a debt except in the manner provided by law, and that the law required an appropriation before the debt could be incurred, and that the debt should be incurred in a certain way, and that process not having been followed, there could be no recovery for the amount of material furnished; holding that if a contract was required there could not be a recovery for the material furnished; thereby establishing the principle which is necessary to be established in order to govern this question, namely, that if a contract system is to be established, the recovery is to be upon the contract, and cannot be in any other way, because if so, the contract system is necessarily abolished.† If a man can make a contract with the city of New York, in violation of law, and the contract be void, and he then can recover upon the *quantum meruit*, the restrictions

* See act of Congress of 1820, § 6, 3 Stat. at L. 568.

† Compare Clark v. U. S. 95 U. S. (5 Otto) 539; and Hawkins v. U. S., 96 Id. (6 Otto) 689.

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thrown around making a contract, are necessarily abolished by the action of the heads of departments which it is designed to restrict.

Therefore, if we come to the conclusion, that this contract must be regulated by the provisions of the dock law, there can be no recovery on the ground of the *quantum meruit*. I desire to state here, and to have it taken down as part of the record in this case, that the sole question which is decided here, is in regard to the legality of this contract, that no question has been passed upon in regard to the performance of the contract. [Further remarks enforcing this limit are omitted.]

Complaint dismissed.

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City Court of Brooklyn; General Term, January, 1878. Again, Court of Appeals, October, 1878.

JURISDICTION OF ACTION BY ASSIGNEE IN BANKRUPTCY.—APPEARANCE.—WAIVER OF JURISDICTIONAL OBJECTION.—SUPERIOR CITY COURTS.—PLEADING.—RIGHT OF TRIAL BY JURY.—MODE OF SECURING IT.—WAIVER.

The State courts are not deprived of jurisdiction of actions by assignees in bankruptcy to collect the assets or recover property belonging to the bankrupt.*

* To similar effect (IVth department), *Wente v. Young*, 12 *Hun*, 220; *Burlingame v. Parce*, *Id.* 146. And see *Tullis v. Miller*, 13 *Id.* 363.

State courts *held* to have jurisdiction of action by assignee in bankruptcy, to determine conflicting claims to assets. *Brewers, &c. Ins. Co. v. Davenport*, 10 *Hun*, 264.

Otherwise of an action by a creditor against the assignee in bankruptcy, for conversion, in disregarding the lien claimed by plaintiff. *Ansonia Brass Co. v. Pratt*, 10 *Hun*, 443.

Whether or not the State courts will apply the provisions of the

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A general appearance by a defendant sued in a local court,—as, for instance, the city court of Brooklyn,—does not waive his right to object in his answer, that the court has no jurisdiction of the subject matter of the action, if the case is such that the only element of locality which can exist, and the only means by which the cause can be brought within the territorial limits of jurisdiction of the court as a local court,* is the service of the summons within those limits. †

bankrupt act, declaring preferences, &c. void, except in the assignees' or creditors' action, is disputed. Compare *Bostwick v. Burnett*, 11 *Hun*, 301; 2 *Perry on Trusts*, 132, § 587; *Id.* 145, § 597.

* For the distinction between the territorial limits of jurisdiction and the limits dependent upon other facts or qualities, see 13 *Abb. Pr. N. S.* 325, note.

† For the purpose of effecting a waiver of want of jurisdiction, actual appearance, as a party, is necessary. *McCormack v. First Nat. Bank*, 53 *Ind.* 466.

Appearing as a witness, for instance, is not a submission to the jurisdiction. *Nixon v. Downey*, 42 *Iowa*, 78. Nor is presence in court without knowledge of the proceedings. *Merkes v. City of Rochester*, 13 *Hun*, 157. And a formal appearance, given under mistake, the court may allow to be withdrawn. *Hunt v. Brennan*, 1 *Hun*, 218.

Appearance waives, not only lack of service, but other irregularities, —such as lack of statute indorsement of summons. *Bissell v. N. Y. Central R. R. Co.*, 67 *Barb.* 385.

An appearance may be special, or qualified so as not to waive an objection. *Brett v. Brown*, 13 *Abb. Pr. N. S.* 295. Compare *Malcolm v. Marshall*, 29 *Ohio St.* 611.

The act of 1873 (*L.* 1873, p. 363, c. 239), confirmed and extended the jurisdiction of this court and the other superior city courts, so as to be "concurrent and co-extensive with that of the supreme court;" subject, however, by virtue of the constitutional provision (1 *R. S.* 6 Ed. p. 95; *Jud. Act of 1869*, art. 6, § 12), to the territorial limitation on the exercise of its powers, implied in its character as a local court. *Landers' Case*, 14 *Abb. Pr. N. S.* 846; *S. C.*, 53 *N. Y.* 450. And see *Story v. N. Y. Elevated R. R. Co.*, 3 *Abb. New Cas.* 478; *Speyer v. Chase*, 37 *Super. Ct. (J. & S.)* 98.

For the precedent jurisdiction of these courts, see *Van Pelt v. U. S. Metallic Spring Co.*, 13 *Abb. Pr. N. S.* 395, and authorities there cited; *Ryan v. Green*, 78 *N. Y.* 295; *Eitel v. Bracken*, 38 *Super. Ct. (J. & S.)* 7; *Astor v. Mayor, &c. of N. Y.*, 87 *Id.* 539.

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Nor does demurring waive the objection, especially if the defendant, pursuant to leave, withdraws the demurrer and answers. After a demurrer has been withdrawn, and an answer substituted, the demurrer is not available to either party for any purpose. The principle upon which these rules depend, is that to extend the jurisdiction of the court to cases not arising within its jurisdiction, where the defendants do not reside, and are not served therein, would be to deprive it of its character as a local court. The joinder of an equitable cause of action with one wholly legal does not deprive defendant of the right of trial by jury.* If such an action is brought to trial at special term, and defendant demands a jury trial† the judge must determine whether any of the grounds on which recovery is sought, are such as at the adoption of the constitution‡ were redressed by an action at law, and if so

The present definition of their jurisdiction is in the Code of Civil Procedure, §§ 263-267. As jurisdictional facts need not be alleged in the complaint (section 266), except so far as they are part of the facts constituting the cause of action, a demurrer could often not avail to raise the question of jurisdiction; and by the last clause of section 266, it is provided that the want of jurisdiction, by reason of the non-existence of any of the jurisdictional facts specified in section 263 is matter of defense; and is waived by the appearance, unless it is pleaded in defense.

The construction and effect of this clause has not yet been determined.

Before this provision took effect, the rule (as laid down in the city court of Brooklyn), was that an individual defendant waived the objection by answering on the merits alone, and going to trial, for he might be presumed to have been served there; but a corporation not established nor having its general business there, did not, because it could not be presumed to have been legally served there. *Brauneck v. Knickerbocker Life Ins. Co.*, 1 *Abb. New Cas.* 393.

* To same effect, *People v. Albany, &c. R. R. Co.*, 57 *N. Y.* 161, rev'g in part 5 *Lans.* 25.

† The demand may be made even after plaintiff has rested after reading the pleadings. *People v. Albany, &c. R. R. Co.*, above cited.

The ground of the right to a jury trial must be truly stated. *McKeon v. See*, 51 *N. Y.* 300; aff'g 4 *Robt.* 449.

‡ 1 *B. S.* 6 Ed. pp. 45, 56, 82.

For recent decisions on what classes of cases are within the constitutional clause, see *Litchfield v. Diezendorf*, 11 *Hun*, 853; *People ex*

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refuse to try the cause without a jury,* unless plaintiff elects to rely solely on the equitable cause of action.†

If in a case brought to trial at special term, the complaint is framed solely for equitable relief, the court cannot, on finding that plaintiff is not entitled to equitable relief, give judgment for damages.

Defendant by consenting that a cause containing several causes of action, one of which is purely of a legal nature, be placed on the special term calendar, and noticing it for trial there, does not waive the objection that he is entitled to a trial by jury.

Whether trial by jury can be waived in any other mode than that prescribed by the code, or by entirely failing to object—doubted.‡

rel. *Killeen v. Baird*, *Id.* 289; *Matter of Donohue*, 1 *Abb. New Cas.* 1; *Kinne v. Kinne*, 2 *Sup'm. Ct. (T. & C.)* 393; *Rexford v. Marquis*, 7 *Lans.* 289.

* Even an equity cause the judge may refuse to try without a jury. *Parker v. Laney*, 58 *N. Y.* 469; rev'g 1 *Supm. Ct. (T. & C.)* 590.

Whether a statute authorizing a reference as to particular facts, and in effect, making the report *prima facie* evidence on the trial before a jury, is obnoxious to the objection of infringing the right of trial by jury, compare *Holmes v. Hunt*, 122 *Mass.* 505; *S. C.*, 23 *Am. R.* 381; *Francis v. Baker*, — *R. I.* 103; *S. C.*, 23 *Am. R.* 424.

† But the complaint should not be dismissed because the cause was brought on at special term instead of at circuit. *Sternberger v. McGovern*, 56 *N. Y.* 12; *S. C.*, 15 *Abb. Pr. N. S.* 257, rev'g 4 *Duly*, 456.

For a ruling, perhaps somewhat questionable, that a motion to compel a party to elect between his causes of action should be made before the cause is called on, see *Am. Dock, &c. Co. v. Staley*, 40 *Super. Ct. (J. & S.)* 539.

‡ The provisions of the present Code of Civil Procedure are as follows :

§ 1008. [am'd 1877.] In an action triable by a jury, if the parties waive the trial by a jury, of the issue of fact, the action must be tried by the court without a jury ; unless a reference is directed, in a case prescribed by law. But such an action, other than to recover damages for breach of a contract, cannot be tried by the court, without a jury, unless the judge, presiding at the term where it is brought on for trial, assents to such a trial. His refusal so to assent annuls a waiver, made as prescribed in subdivision second, third, or fourth of the next section.

§ 1009. [am'd 1877.] A party may waive his right to the trial of the issue of fact, by a jury, in any of the following modes :

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Appeal by the defendant from a judgment of the general term of the city court of Brooklyn.

The action was brought by Adam D. Wheelock, as assignee in bankruptcy of Charles M. Tremaine and William B. Tremaine, against Henry M. Lee, to recover an alleged excess of usurious interest, and also to obtain the delivery and surrender of certain securities alleged to have been deposited by the bankrupts with the defendant, as collateral to usurious loans.

The action was commenced in September, 1873, by service in the city of New York of process upon the defendant, who was a non-resident of Kings county.

A demurrer was interposed on the grounds that several causes of action were improperly united, and that the complaint did not state facts sufficient to constitute a cause of action. This was overruled, and defendant answered, denying, among other things, the making of the usurious loans, and alleging that the court had no jurisdiction of either the person of the defendant or the subject-matter of the action.

The case was tried before a judge without a jury, and judgment rendered for the plaintiff. This judgment was affirmed by the general term of the court, but was reversed in the court of appeals, and a new trial granted (see *Wheelock v. Lee*, 64 *N. Y.* 242).

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1. By failing to appear at the trial.
 2. By filing with the clerk a written waiver, signed by the attorney for the party.
 3. By an oral consent in open court, entered in the minutes.
 4. By moving the trial of the action, without a jury; or, if the adverse party so moves it, by failing to claim a trial by a jury, before the production of any evidence upon the trial.

See the former code, § 286. See also *Green v. Millbank*, 3 *Abb. New Cas.* 138.

For the rule that consent to try before a term other than the regular term, waives the irregularity, see *White v. Coulter*, 59 *N. Y.* 620; rev'g in part, 1 *Hun*, 357.

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The case was again tried by a judge, a jury having been refused the defendant.

The testimony in the case showed that there were five transactions in all, between Tremaine & Bro. and the defendant, out of which the matter in controversy arose. Four of these transactions were similar, and were reduced to writing. The exhibits were in form, bills of sale of certain promissory notes therein described from Tremaine & Bro., to defendant for a consideration therein named. Underneath each bill of sale is written the following, signed by the defendant :

"Should the above notes be paid at maturity, or within two days after protest, C. M. T. & Bro. are entitled to claim from me the sum of \$——, less costs of collection on above notes when the last one is paid."

The notes delivered by T. & Bro. were indorsed by them to the defendant. Many of them were not paid at maturity, or within the two days mentioned, and at last the defendant and Tremaine & Bro. had a final settlement, in which no money passed, but defendants returned to Tremaine & Bro. all but six of the notes unpaid, and also their firm checks for \$575, and the latter gave to defendant six other notes, four of which were paid, and applied upon the moneys due the defendant upon the four previous loans.

The court found that all the loans had been repaid, and gave judgment for the plaintiff for the excess of interest for the same amount as in the former judgment, and for all the notes except two.

The defendant again appealed to the general term, and the following is that portion of the opinion handed down by the court in rendering its decision, which relates to the court's jurisdiction of the action.

REYNOLDS, J.—The first question to be considered is whether the court has jurisdiction of this action. It

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is a suit brought by an assignee in bankruptcy to collect debts, and recover property alleged to belong to the bankrupt. The bankrupt act of 1867, section 1, gives the district courts jurisdiction (among other matters) "of the collection of the assets of the bankrupt." This jurisdiction has been repeatedly held, to be not exclusive, but concurrent with that of the State courts. Such an action is not a matter or proceeding in bankruptcy of which the Federal courts have exclusive jurisdiction (See *Claffin v. Houseman*, 93 *U. S.* 130; *Cook v. Whipple*, 55 *N. Y.* 150). It is claimed, however, that the State courts have been deprived of jurisdiction in such actions, except in a limited class of cases, by section 2, of chapter 390, *Laws of 1874*. This is an amendment of section 1 of the bankrupt act, above referred to, and is as follows: "Provided, that the court having charge of the estate of any bankrupt, may direct that any of the legal assets or debts of the bankrupt, as contradistinguished from equitable demands, shall, when such debt does not exceed \$500, be collected in the courts of the States, where such bankrupt resides, having jurisdiction of claims of such nature and amount." As I read this proviso it neither professes to confer any jurisdiction upon the State courts, nor take away any jurisdiction which they possess. Its obvious purpose and construction is to empower the district courts to rid themselves of a certain class of cases by sending them to a forum which is recognized as already having jurisdiction over such matters. We are referred to the case of *Olcott v. Maclean* (10 *Hun*, 277*) as holding that the State courts are deprived of jurisdiction, except in the cases which the district courts may direct to be brought be-

* The question there was whether a transfer of goods was void as in fraud of the bankrupt act, because making a preference, &c. But the judgment was reversed, April 4, 1878. See 13 *Hun*, vii.

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fore them. We have very great respect for the authority of the court making that decision; but if the reasoning is meant to apply to a case like the one before us, we are unable to concur in it. That action was brought upon a case arising under the laws of the United States, the cause of action was created by the bankrupt law, and it may be that of such a cause of action, the courts of the United States have exclusive jurisdiction. But the cause of action in this case existed independent of any act of Congress, the assignee merely standing in the place of the borrower, to prosecute an action which he might have maintained, if he had not become a bankrupt. The court, in *Olcott v. Maclean* (p. 281), says "enumerating the cases that might be prosecuted in such courts" (State courts), "excluded all others not included by the import of the terms made use of." But section 1 of the bankrupt act, either as originally passed or amended by the act of 1874, is one conferring jurisdiction on the district courts, not on the State courts; it does not say what the State courts may or may not try. As amended, it specifies what the district courts may decline to try, leaving it optional with them to do so or not. It neither takes away the jurisdiction of the district courts in those cases which they may send to the State courts, nor the jurisdiction of the State courts in such actions as cannot thus be sent to them. In the later cases the selection of the tribunal is left to the suitor, and not to the district courts. The view we have taken concurs with that held by Judge GILBERT, in a case before him, at special term, and is in accordance with the supreme court of Massachusetts, in *Goodrich v. Wilson* (119 *Mass.* 429). GRAY, Ch. J., says: "The effect of the provision of the act of Congress of 1874 (c. 390, § 2), is not to confer or take away jurisdiction of the State courts, but simply to allow the Federal courts of original jurisdiction to decline to entertain

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actions at common law, to which the assignee is a party, in which the debt demanded is less than the amount which determines the jurisdiction in other cases.

The next objection made to our jurisdiction is, that the defendant was a non-resident of the city of Brooklyn at the time of the service of the summons, and that such service was made in the city of New York. This would have been a fatal objection, if taken in time. The defendant appeared and demurred to the complaint on other grounds. The demurrer was overruled; the defendant was permitted to answer. The objection was first raised by the answer. We think the raising and trying of an issue of law, before objecting to our jurisdiction was a waiver of such objection (see *Ogdensburg, &c. R. R. Co. v. Vermont, &c. R. R. Co.*, 63 *N. Y.* 176). It appears from an examination of the appellant's points used before the court of appeals, that this ground of objection to our jurisdiction was there argued, and it is to be presumed that, if that court had considered us without jurisdiction, it would not have sent the case back for re-trial upon the merits.

The remainder of the opinion was devoted to a discussion of the case on the merits, and after reviewing the whole case on the facts, as well as on the law, judgment was given in favor of the plaintiff for \$280 for the excess of interest, and \$432 costs, upon plaintiff's waiving claim to any further relief. The plaintiff so stipulated, and the court permitted defendant to appeal to the court of appeals.

Geo. W. Van Slyck, for appellants,—Cited, as to jurisdiction of city court of Brooklyn: *Landers v. Staten Island R. R. Co.*, 53 *N. Y.* 450; *Hoag v. Lamont*, 60 *Id.* 96. As to effect of the demurrer: *Ogdensburg, &c. R. R. Co. v. Vermont, &c. R. R. Co.*, 63 *N. Y.* 176; *Brown v. Saratoga R. R. Co.*, 18 *Id.* 495; *Du*

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Puy v. Strong, 37 *Id.* 372. As to defendant's being entitled to a trial by a jury: *Palen v. Johnson*, 50 *Id.* 49; *Wheelock v. Lee*, 64 *Id.* 246; *Bradley v. Aldrich*, 40 *Id.* 511; *Davis v. Morris*, 36 *Id.* 572; *Hudson v. Caryl*, 44 *Id.* 553; *People v. Albany & S. R. R. Co.*, 57 *Id.* 161-176. As to non-recovery of usurious excess of interest by assignee until after the loan with legal interest has been repaid: *Wheelock v. Lee*, 64 *N. Y.* 246; *Whitehead v. Kennedy*, 69 *Id.* 462; *East River Nat. Bank v. Gove*, 57 *Id.* 597. As to error of finding of usury: *Dowdall v. Lenox*, 2 *Edw. Ch.* 267; *Colton v. Dunham*, 2 *Paige*, 267; *Smith v. Paton*, 31 *N. Y.* 66; *Ingalls v. Lee*, 9 *Barb.* 647, and cases cited; *Cram v. Hendricks*, 7 *Wend.* 569; *Rapelye v. Anderson*, 4 *Hill*, 472; *Youngs v. Lee*, 18 *Barb.* 187. As to no cause of action being set forth in the complaint, no loan being alleged, but only an agreement for a loan: *Rex v. Upton*, *Strange*, 816; *Manning v. Tyler*, 21 *N. Y.* 567.

B. E. Valentine, for respondent,—Cited, as to the court's jurisdiction of the subject matter of the action: *Olcott v. McLean*, 10 *Hun*, 277, and *Kidder v. Horribin*.* As to effect of the general appearance of the defendant, and the demurrer: *Ogdensburgh R. R. v. Vermont R. R.*, 63 *N. Y.* 176.

BY THE COURT.—RAPALLO, J.—The defendant set up in his answer that the plaintiff's cause of action, if

* State courts have concurrent jurisdiction with the Federal courts in cases arising under the constitution, laws or treaties of the United States, unless excluded by express provision or from the nature of the particular case. A State court has jurisdiction of an action brought by an assignee in bankruptcy upon a draft forming part of the assets of the bankrupt, and the authority of the bankrupt court is not necessary to entitle the assignee to sue. Judgment below affirmed. *Kidder v. Horribin*, Jan. 15, 1878. Opinion by ANDREWS, J., *ALL. L. J.*, vol. 17, p. 438.

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any, did not arise in the city of Brooklyn, but in the city of New York; that at the time of the commencement of this action the defendant did not reside in the city of Brooklyn; that he never resided or had a place of business there; and that the summons was served in the city of New York, and not in the city of Brooklyn; and that consequently the city court of Brooklyn had no jurisdiction of the person of the defendant or of the action.

These allegations are substantiated by the evidence and findings, and it is conceded that they establish a want of jurisdiction in the city court and a fatal objection to the judgment, unless such objection has been waived or cured.

This question was not passed upon, nor did it arise, when this case was before us on the first appeal. The facts upon which the objection is based were not in the case, the court below having excluded proof of them; a new trial was ordered on other exceptions.

The defendant, by putting in a general appearance, followed by an answer setting up the want of jurisdiction, did not waive that defense.

This was expressly decided in the case of *Landers v. Staten Island R. R. Co.*, 53 *N. Y.* 450-460; *S. C.*, 14 *Abb. Pr. N. S.* 346.

The prevailing opinion in that case sets forth fully the grounds upon which it was held that the city court was without jurisdiction. They are, in substance, that the city court was a local court of limited jurisdiction at the time of the adoption of the judiciary articles of the State constitution in 1869, and that it was continued as such, and it was even beyond the power of the legislature to divest it of its local character; that its jurisdiction was limited to causes of action arising within its territorial limits, and cases in which the subject of the action was situated, or the party proceeded against resided or was served with process

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within those limits ; that some one or more of these elements of locality must exist to confer upon the court jurisdiction of the cause. It follows that where none of them exist, a mere appearance does not preclude the defendant from taking the objection. Where no other ground of jurisdiction exists, the service within the county is a jurisdictional fact. Its omission is not cured by an appearance, for the objection is not simply that the court has not jurisdiction of the person of the defendant, but that it has not jurisdiction of the cause (*Burckle v. Eckhart*, 3 *N. Y.* 182).*

In a case in which the court had jurisdiction of the cause on some of the other grounds, as,—for instance, where the cause of action arose within the city of Brooklyn,—the general rule would apply that a general appearance cures any defect in the service of process to bring the defendant into court, and even the total absence of any service. But where, as in this case, the only element of locality which can exist, and the only means by which the cause can be brought within the jurisdiction of the court as a local court, is the service of the summons within a certain territory, that rule is not applicable ; but the point having been expressly adjudged, it is not necessary to pursue it farther.

It is further claimed that the defendant, by interposing a demurrer to the complaint, precluded himself from setting up the defense of want of jurisdiction after his demurrer was overruled, and the case of *Ogdensburg R. R. v. Vermont R. R.*, 63 *N. Y.* 176, is cited as sustaining that position.

In that case a demurrer was interposed on the ground that it appeared on the face of the complaint that the court had not jurisdiction over the defendants, they being foreign corporations and non-residents. It

* See also *Gibbs v. Queen Ins. Co.*, 63 *N. Y.* 114.

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was not held that by the fact of demurring the defendants waived this ground of demurrer.

On the contrary, the demurrer was sustained in the supreme court, and the plaintiff appealed to this court. The defendants moved to dismiss the appeal, which had been taken from the decision rendered in their favor, on the ground, among others, that they had not been served with process in the action. The case was not one in which the service of process, within any particular locality, was a fact upon which the jurisdiction of the court over the cause depended, nor was it analogous to the present case in any particular. In the present case leave was granted to the defendant to withdraw his demurrer and put in his answer. He availed himself of this leave, and answered, setting up facts showing that the city court had no jurisdiction. The demurrer was then out of the case and formed no part of the record (*Brown v. Saratoga R. R. Co.*, 18 *N. Y.* 495). It is not available to either party for any purpose, and the fact that it was once interposed does not preclude the defendant from setting up the facts which he might originally have set up by way of answer showing want of jurisdiction.

For the same reason that this objection was not waived by his appearance, it is not cured by the facts that he demurred and withdrew his demurrer.

The same facts existed in the case of *Hoag v. Lamont* (60 *N. Y.* 96), but they were not deemed material, and the subsequent defense by answer of want of jurisdiction was sustained.

The principle upon which all these decisions rests is, that to extend the jurisdiction of the city court to cases not arising within its jurisdiction, where the defendants do not reside and are not served therein, would be to deprive it of its character of a local court, and that some one of the specified elements of locality must exist to give it jurisdiction of the cause.

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Under the decisions cited the defense of want of jurisdiction was established.

The appellant takes the further point that he was entitled to a trial by a jury.

The first four causes of action specified in the complaint are clearly triable by jury. They are for the recovery of money only, and maintainable at common law (50 *N. Y.* 49 ; 64 *Id.* 246).

The fifth cause of action only is for equitable relief, viz: The surrender of the securities given for the usurious loans. The joinder of an equitable cause of action with others, purely legal, does not deprive the defendant of the right of trial by jury (Bradley v. Aldrich, 40 *N. Y.* 511).

Where such an action is brought to trial at special term, and the defendant demands a jury trial, the judge must determine whether any of the grounds upon which a recovery is sought, are such as at the adoption of the constitution were redressed by an action at law, and, if so, should direct the cause to be tried by a jury at the circuit, or, at all events, should refuse to try the cause without a jury (Davis v. Morris, 36 *N. Y.* 569, 572 ; Hudson v. Caryl, 44 *Id.* 553).

Where the complaint is framed solely for equitable relief, and the action is tried as an action in equity, the court, on finding that the plaintiff is not entitled to any equitable relief, but that the facts would warrant an action for damages which he has not alleged or claimed, cannot order judgment for such damages (Bradley v. Aldrich, 40 *N. Y.* 504).

An opportunity must have been afforded to the defendant to claim a jury trial on that ground of action.

The respondent claims that the appellant waived his right to a jury trial by consenting that the case be placed on the calendar for trial at special term, and by noticing the case for trial at that term. We do not think these acts amounted to a waiver. There was not

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consent that the action be tried without a jury, and at the first opportunity the defendant demanded a jury trial. The case, in one of its aspects, was triable at special term, and had the plaintiff elected to rely solely on this equitable cause of action, he could have proceeded with the trial there.

In the cases cited above, this court gives a strong intimation that a trial by jury can be waived only in the manner described by the code or by entirely failing to object; but it is not necessary to decide that point now. It is sufficient to hold that at all events there must be some unequivocal act or consent showing an intention to abandon the constitutional right; and no such intention is apparent here.

Being of opinion that on both of the grounds stated the judgment must be reversed, it is not necessary to consider the other points in the case.

All the judges concurred, except MILLER and EARL, JJ., absent.

Judgment reversed, with costs.

ROBY v. HALLOCK.

N. Y. Supreme Court, Fourth Department; Special Term, August, 1878.

PLEADING.—MOTION TO STRIKE OUT DENIAL AS SHAM.

A verified denial of knowledge or information sufficient to form a belief whether the note stated in the complaint (as made by the answering defendant, and indorsed by the payees to plaintiff) was ever transferred or indorsed to plaintiffs, as alleged in said complaint or otherwise, cannot be struck out on motion as sham.*

* As to frivolous denial, see *Merchant's Bank v. McNaughton*, 1 *Abb. New Cas.* 293, n.

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Motion by plaintiff to strike out answer as sham, false and untrue.

This action was brought by Sidney B. Roby, and others, against Emma F. Hallock, and others.

The complaint was upon a promissory note for \$160, alleged to have been made by defendant, Hallock, payable to the order of the defendants, Meacham and Burr, by which she charged her separate estate, and which she delivered to the other defendants, who "duly indorsed the said note in their firm name to the plaintiffs before maturity for value."

The answer was a denial of "any knowledge or information sufficient to form a belief whether the note stated in the complaint was ever transferred or indorsed to plaintiffs as alleged in said complaint, or otherwise."

Charles M. Williams (F. M. Bottum, attorney), for motion,—Cited *Fleury v. Roger*, 9 *How. Pr.* 215; *Commonwealth Bank v. Pryor*, 11 *Abb. Pr. N. S.* 227; *President, &c. of Agawam Bank v. Egerton*, 10 *Bosw.* 669-673; *People v. McCumber*, 18 *N. Y.* 315; *Kay v. Whittaker*, 44 *Id.* 566, 573; *Corbett v. Eno*, 22 *How. Pr.* 8; *S. C.*, 13 *Abb. Pr.* 67, and 8 *How. Pr.* 9; *Manufacturers' Bank of Rochester v. Hitchcock*, 14 *How. Pr.* 407; *Miller v. Hughes*, 13 *Abb. Pr.* 93, n; *McCarty v. O'Donnell*, 7 *Robt.* 431; *Roome v. Nicholson*, 8 *Abb. N. S.* 343; *Hays v. Southgate*, 10 *Hun.* 513.

T. Horr, opposed.

ANGLE, J.—The only question in the case is whether the court has power to strike out the answer; and if it has the power, I am quite satisfied it should be exercised in this case.

For answer alleging that plaintiff is not the real party in interest, see *White v. Drake*, 3 *Abb. New Cas.* 183.

Denials frivolous if not material. *People v. Dispensary Society*, 7 *Lans.* 304.

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That the issue made was a material one, was long since settled (*Snyder v. White*, 6 *How. Pr.* 321; *Leach v. Boynton*, 3 *Abb. Pr.* 1; *Sherman v. Bushnell*, 7 *How. Pr.* 171), and it cannot be stricken out as sham (*Thompson v. Erie R. R. Co.*, 45 *N. Y.* 468).

The plaintiff's counsel cites and relies much upon *Kay v. Whittaker* (44 *N. Y.* 566), decided by the commission of appeals in September, 1871, and after the court of appeals had in the same year, in the cases of *Wayland v. Tysen*, and *Thompson v. Erie R. R. Co.* (45 *N. Y.* 281, 468), held the other way.

The case of *Kay v. Whittaker* goes much to sustain *People v. McCumber* (18 *N. Y.* 315), which Judge GROVER says, in *Wayland v. Tysen*, did not involve the point, and that it cannot be regarded as an authority for the construction contended for, and the practice has since conformed to the latter case. *Schultze v. Rodewald* (1 *Abb. New Cas.* 365), *Fellows v. Muller* (38 *N. Y. Super. Ct.* 137), and *Farmers' Nat. Bank of Fort Edward v. Leland* (50 *N. Y.* 673), appear to cover this case completely.

The motion must be denied; but as it was sustained by *Kay v. Whittaker*, it is without costs.

STENT v. CONTINENTAL NATIONAL BANK.
*N. Y. Supreme Court, First Department; Special
Term and Chambers, December, 1877.*

ANSWER ON INFORMATION AND BELIEF.—PLEADINGS.—CODE OF CIV.
PRO. § 537.

Under the Code of Procedure an answer was allowed, positively denying, when in fact the denial was simply on information and belief, which the verification could show; but under the Code of

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Civil Procedure which does not allow such a verification, a denial on information and belief must be so expressed in the answer, and such an answer is not frivolous.*

Motion for judgment upon the answer as frivolous.

This action was brought by Thomas Stent, against the Continental National Bank of New York, to recover \$675 for preparing a set of drawings, plans and specifications for certain alterations in its building in Nassau street.

The answer was as follows :

"The defendant answers the complaint herein upon information and belief :

"That no allegation thereof is true, except as to the incorporation of the defendant, and that nothing has been paid to the plaintiff."

The defendant moved on the pleadings for judgment upon the answer, as frivolous.

Sedgwick & Curtis, for the motion.

Thomas G. Shearman (*Shearman & Sterling*, attorneys), opposed.

DONOHUE, J.—Under the old code the mode of pleading allowed an answer positively denying, when in fact that denial was simply on information, and so the verification could show. I do not understand the code as it now stands as allowing such a verification, and therefore, the denial on information must be in the answer, and so stated.

Motion denied.

* Followed in *Metraz v. Pearsall*, *post*, 90.

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METRAZ v. PEARSALL.

N. Y. Supreme Court, First Department; Special Term and Chambers, September, 1878.

ANSWER ON INFORMATION AND BELIEF NOT FRIVOLOUS.—PLEADINGS.—CODE OF CIV. PRO. § 537.

Under the Code of Civil Procedure, a defendant may deny upon information and belief.*

An answer in the following form is proper: "Defendant answers to the complaint herein, upon information and belief, as follows: he alleges that no allegation of said complaint is true except that \$100 has been paid."

Motion for judgment on the answer as frivolous.

This action was brought by Fanny Metraz against Thomas W. Pearsall.

The complaint alleges that the plaintiff performed for the defendant, at his request, certain services; and also, at his request, furnished to the defendant certain goods of the value of \$1,031.25, which the defendant agreed to pay, of which only \$100 has been paid.

The answer is literally as follows:

* To similar effect, see *Maclay v. Sands*, 94 *U. S.* (4 *Otto*) 586,—a case which arose under the Montana code.

Where the complaint alleges only a part of the entire contract, defendant may deny, and under denial prove the entire contract. *Marsh v. Dodge*, 66 *N. Y.* 533; rev'g 4 *Hun*, 278; *S. C.*, 6 *Sup'm Ct. (T. & C.)* 568.

An inconsistent allegation is not alone a sufficient denial. *Mars-ton v. Sweet*, 66 *N. Y.* 206; rev'g 4 *Hun*, 156.

See also, as to the effect of various denials, *Meehan v. Harlem Savings Bank*, 5 *Hun*, 439, 440 (compare 58 *N. Y.* 491); *Townshend v. Townshend*, 1 *Abb. New Cas.* 81, 84; *Church of Redemption v. Grace Church*, 6 *Hun*, 166, 174; *Powers v. French*, 1 *Id.* 582, 583; *Manning v. Winter*, 7 *Id.* 482, 484; *Miller v. Ins. Co. of North America*, 1 *Abb. New Cas.* 470, 472, and cases cited.

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"The defendant answers to the amended complaint herein upon information and belief, as follows:

"He alleges that no allegation of said complaint is true except that \$100 has been paid."

The plaintiff moved for judgment upon the answer as frivolous, pursuant to section 537 of the Code of Civil Procedure.

John J. Macklin (*Roe & Macklin*, attorneys), for the motion.—I. The answer is frivolous because it alleges *upon information and belief* that the allegations set forth in the complaint are not true allegations, the truth or falsity of which are in defendant's personal knowledge (*Thorn v. N. Y., &c. Mills*, 10 *How. Pr.* 20; *Lewis v. Acker*, 11 *Id.* 163; *Van Santvoord's Pleadings*, 431, 432, 440, 446; *Woods v. Morrell*, 1 *Johns. Ch.* 103; *Edwards v. Lent*, 8 *How. Pr.* 28).

II. The answer is insufficient as to form. It does not deny any allegation—at most it is merely a statement inconsistent with the allegations in the complaint (*Van Santvoord's Pleadings*, 431, 434; *Powers v. Rome, &c. R. R. Co.*, 3 *Hun.* 285).

Thomas G. Shearman (*Shearman & Sterling*, attorneys), opposed:—I. The plaintiff undoubtedly relies, in making this motion, upon the *obiter dictum* in *Powers v. Rome, Wat. & Og. R. R. Co.* (3 *Hun.* 285), to the effect that a denial upon information and belief would seem to be frivolous. But this is only an *obiter dictum*, and affords an excellent illustration of the danger of relying upon such loose expressions uttered by the courts without that caution and sense of responsibility which accompany a formal decision. For a very little consideration will suffice to show that such an answer could in no case be *frivolous*, and that it could only be treated as *sham* by a distinct method of proceeding, and upon proof or necessary presumption that the facts were within the personal knowledge of

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the pleader. Moreover, whatever might have been the rule under the old code of procedure, it is impossible for the court to lay down any such rule as the plaintiff here claims, in actions brought under the new code, as we shall show in our further points.

II. Under the old or the new code the only remedy against an answer of this kind, if objectionable at all, is by a motion to strike out as sham, upon which affidavits can be used upon either side. On the present motion no affidavits can be used; and unless the court can and must entertain a conclusive presumption that all the facts alleged in the complaint are within the defendant's personal knowledge, it cannot say that an allegation upon information and belief is objectionable. Now, it will be obvious at a glance that the complaint is drawn in a form consistent with the supposition, either that the defendant in his own proper person received the goods and agreed to pay the price, or that some agent of the defendant did so. And, in point of fact, it will never be pretended in this case that the defendant did personally receive any of these goods or make any promise to pay for them. It will be claimed on the trial that his agent did so in his absence; and evidence in proof of that theory would be admissible in support of the complaint. But the defendant can, under these circumstances, have no personal knowledge as to whether his agent did or did not receive these goods and promise to pay for them. It is, therefore, impossible for him to plead to any part of the complaint upon his own knowledge; and this being not only conceivably but actually the case, as would appear if the matter could be tested by affidavits, the court cannot have that judicial notice of the facts which is necessary in order to deal with a pleading where no affidavits are used.

III. But there is a further and more fundamental difficulty in the way of making an objection, like this,

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the basis of a motion for judgment on the answer as frivolous. The question whether the pleading is true or not, or whether it is pleaded in good faith or not, cannot be raised on a motion of this kind. No matter how wildly improbable it may be, that is of no importance. The only question at issue is whether, if true, the answer presents a legal bar to the complaint. Now if, as is here alleged, no allegation of the complaint is true, it is not of the slightest importance whether the defendant knows this or only believes it, or even if he does not believe it. If the complaint is untrue, the plaintiff is not entitled to recover, even though the defendant believed every word of it to be true. And the real explanation of the *obiter dictum* on which the plaintiff relies, is that the court confounded a denial "upon information and belief" with a denial "of information and belief." When a defendant denies that he has any knowledge or information sufficient to form a belief concerning the allegations of the complaint, he uses a peculiar and strictly statutory form of issue,* which he is therefore obliged to follow very closely; otherwise he easily runs into an immaterial issue. For it is not of the slightest legal importance whether he has any knowledge or belief on the subject. The real issue is "is the complaint true?" Now, in what are often erroneously called "denials upon information and belief," the defendant denies that he has knowledge, or that he has information, or that he has a belief, as to whether the complaint is true, but none of these questions are really material; and while the statute makes an issue upon these points good, when tendered in a particular form, nothing except that exact

* The propriety of this form of denial depends on the statute, and on the old usages of equity pleading to meet a bill for discovery. Hence, such a denial is not sufficient as evidence in an affidavit, nor in proceedings where the statute and equity principle do not apply, as in case of proceedings on mandamus and the like.

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form will suffice. But when, as in this case, the defendant distinctly avers that no allegation of the complaint is true, he has the right to do that upon knowledge, or upon information, or upon belief without information.

IV. Under the new code of civil procedure the question is entirely clear. By section 526 the defendant is made liable to conviction for perjury if he fails to allege distinctly, in the answer, how much of it is stated on mere belief as distinguished from personal knowledge. In the present case the defendant could not by any possibility know personally that his agent or agents have not made the contract alleged in the complaint. He can have nothing but information and belief on the subject. If then the court will not allow him to allege in his pleading, upon information and belief, that the complaint is untrue, it shuts him up to the alternative of submitting to pay a claim entirely unfounded, or of committing perjury and suffering its penalty.

V. It will hardly be said in answer to this argument that because the complaint and form alleges "that the defendant agreed to pay" the defendant ought, therefore, to have assumed that his personal act alone was intended, and should thereupon have made a denial as of his own knowledge. If the defendant had done so with a full understanding that the real meaning of the complaint was that his agent, and not himself, had made the promise, he would have made but a sorry figure upon the trial of the cause. The court will no more compel parties to equivocate than it will compel them to commit perjury.

VI. This motion has been already disposed of in principle, by a decision made last winter in this court in the case of *Stent v. Continental National Bank*,*

* See page 88, *ante*.

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where the answer was in precisely the same form. The same motion was made and it was denied with costs.

WESTBROOK, J., denied the motion, without costs, and the usual order was entered.

CLEGG v. AIKENS.

New York Supreme Court, First Department; Special Term, November, 1877.

PLEADING.—PARTIES.—ADVERTISING AGENCIES.—NEWSPAPER
UNIONS.—ALLEGATION OF CONCLUSION OF LAW.

A single action does not lie against several advertising agency corporations or associations, for the breach of a contract by their common agent, unless there is some statement in the complaint to connect them.

Where the complaint alleged that several newspaper union corporations together composed the American Newspaper Union, which was a corporation, and that the general agent of the latter agreed with plaintiff for the insertion of his advertisements in the several newspapers owned and controlled thereby,—*Held*, that the subordinate corporations, who were alleged to be the incorporators, were not proper parties to an action founded on the agreement.

Demurrer to complaint.

This action was brought by Charles A. Clegg, a general advertising agent, against eight defendants—six corporations, and two natural persons, viz: Andrew J. Aikens; The American Newspaper Union; The New York Newspaper Union; The Chicago Newspaper Union; The Aikens Newspaper Union, now known as The Cincinnati Newspaper Union; The

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Southern Newspaper Union ; The Milwaukee Newspaper Union, and Ansel N. Kellogg.

The complaint alleged : "That five of these defendants, to wit : The American Newspaper Union ; The Chicago Newspaper Union ; The Aikens Newspaper Union, now known as The Cincinnati Newspaper Union ; The Southern Newspaper Union, and The Milwaukee Newspaper Union, were, and still are, foreign corporations, doing and transacting a general advertising business, and that the time and place of their incorporation is unknown to plaintiff.

"That another defendant, to wit : The New York Newspaper Union, was and still is, a corporation created by, and existing under, the laws of this State, and more particularly pursuant to the provisions of an act entitled, 'An Act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes,' passed February 17, 1848, and the several acts amendatory thereto ; and that this defendant was, and still is, also engaged in the general advertising business.

"That of the remaining two defendants, to wit : Andrew J. Aikens and Ansel N. Kellogg ; the former, Aikens, is one of the original incorporators of the defendant, The New York Newspaper Union, and that at the times afterwards mentioned in the complaint, and up to about the 15th day of January, 1877, he was president of each of the above mentioned corporations.

"That all these defendants, corporations, were collectively known, and designated as, and composed, The American Newspaper Union, whereof the said defendant, Andrew J. Aikens, was president.

"That the defendant Ansel N. Kellogg, was, at the times mentioned in the complaint, and at the commencement of this suit, engaged in the general advertising business in the city of Chicago, State of Illinois,

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and at all such times, was the proprietor of 'A. N. Kellogg's Chicago List.'

"That one Edward W. Foster was the general agent of said 'The American Newspaper Union,' and 'A. N. Kellogg's Chicago List,' on June 1, 1873, and continued to act as such until January 2, 1877, at the city of New York.

"That on or about June 10, 1873, negotiations were entered upon between plaintiff and Foster, as such agent, and on investigation the same day, Foster promised plaintiff that he should have as low rates for advertising in the papers represented by Foster, as any other agent, agency or advertiser.

"That plaintiff, relying on such arrangement, at different times between June 10, 1873, and May 1, 1876, gave to Foster, as agent as aforesaid, orders for the insertion of advertisements in the newspapers represented by Foster, amounting in gross value to the sum of about \$200,000.

"That at various times when plaintiff gave Foster, as agent, such orders, Foster represented to plaintiff that he was receiving as low rates as any other, and even lower than any one else.

"That in fact such representation was false. That during this period, lower rates were allowed to sundry others in New York, Philadelphia, and elsewhere.

"That by reason thereof, plaintiff sustained loss and injury in his business, and was induced to pay money to defendants which he was not bound to pay, and which was unlawfully and fraudulently exacted, demanded, and received from plaintiff by defendants, to plaintiff's damage \$28,000."

Judgment was demanded for that sum.

The defendant, The New York Newspaper Union, demurred on grounds indicated below.

Chauncey B. Ripley, in support of the demurrer.—

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I. The complaint is bad on demurrer, because two causes of action have been improperly united, viz.: (1.) One arising on an alleged contract with Foster, as agent of the American Newspaper Union, and (2.) another arising on an alleged contract with Foster as agent of A. N. Kellogg's list. Any cause of action arising under the former, would not affect the defendant Kellogg, as proprietor of the Chicago list; nor would a cause of action arising under the latter, affect any defendant except such proprietor. It must appear upon the face of the complaint that all the causes of action united in the same complaint affect all the parties (*Code of Civil Procedure*, § 484, subd. 9). And this defect is alike fatal whether plaintiff seeks to sustain his complaint on a cause of action arising *ex contractu* or *ex delicto*. (a.) If arising on contract. 1. That the alleged cause or causes of action arise *ex contractu*, and not *ex delicto*, is distinctly held in a recent similar case (*Holtz v. Schmidt*, 59 N. Y. 257). 2. If so, it is such a joinder as is not permissible under section 484 of the Code, above cited, because such cause does not affect all the parties defendant according to the requirement of that section of the Code. The Code has not changed the rule established under the old practice, "but now, as before, the causes of action to be joined must be in favor of all the plaintiffs, and against all the defendants, and must belong to the same class" (*Enos v. Thomas*, 4 How. Pr. 50; *De Ridder v. Schermerhorn*, 10 Barb. 639, affirming *Enos v. Thomas*, *supra*, and citing many cases). (b.) If founded in tort. Granting that the alleged cause or causes of action arise *ex delicto*, and that the fraud and deceit suggested in the complaint are properly pleaded; the complaint is still open to the same objection—improper joinder of causes of action; for that a union of *wrong-doers*, as parties defendant, may be possible, "there must be some com-

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munity in the wrong-doing among the parties who are to be united as co-defendants ; the injury must in some sense be their *joint work*'' (*Pomeroy's Remedies*, § 308, and cases cited). There are, therefore, two separate and distinct causes of action under the *ex delicto* theory, and the same fatal objection holds good—there is no allegation of community in the wrong-doing. The rule is the same, and the complaint is bad, whichever the theory, because of improper joinder of causes of action (*Code of Civil Procedure*, § 484, subd. 9).

II. There is a defect of parties defendant, to wit: the original co-incorporators of the defendant, the New York Newspaper Union, of which defendant Aikens is alleged to be one. 1. Organization under the statute referred to implies that there were *three*, at least, of the original incorporators. No number less than three could effect an organization under the statute. The provision is "three or more" (*Laws* 1848, ch. 40). 2. If one is liable as an incorporator, all are. 3. It is a matter of interest to each defendant that all liable be made co-defendants, that they may contribute to the defense and satisfaction of any judgment obtained by plaintiff. 4. The remaining co-incorporators are presumed to be living unless the complaint shows the contrary (*Greenleaf on Evidence*, § 41). 5. And demurrer is the proper means of raising the question (*Code of Civil Pro.* § 488, subd. 6 ; *Eaton v. Balcom*, 33 *How. Pr.* 80 ; *Zabriskie v. Smith*, 13 *N. Y.* 336).

III. Again, the complaint is radically defective in this. That it does not state facts sufficient to constitute a cause of action. No cause of action is stated in the complaint attaching to any of the defendants appearing, other than Kellogg and The American Newspaper Union ; for none of the defendants named can be held as parties to either of the contracts made by plaintiff with Foster as agent, unless it be Ansel N.

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Kellogg and The American Newspaper Union corporation. They alone appear respectively as parties of the second part of the supposed agreements. Moreover, The American Newspaper Union must be one thing or the other—a corporation or not a corporation. If it is a corporation, those composing it should not be made defendants; it should be sued in its corporate name only. If it is not a corporation, it should not be sued in its corporate name, but in some other way, according to the nature of its organization,—*e. g.*, if a partnership, by joining the copartners; if an association, unincorporated, other than a partnership, according to its nature,—but in no case in the form adopted in this action. Such form is an *anomaly* in pleading, and without authority (Allen v. Patterson, 7 N. Y. 476, 478; *Code of Civil Pro.* § 481, subd. 2).

IV. Admission, by the demurrer, of facts alleged in the complaint is qualified, and is only an admission on the argument. It admits the facts if *well pleaded*, but it admits no mere statement of a conclusion of law. No importance attaches to the terms so often occurring in complaint: “not lawfully,” “unlawfully,” “fraudulently,” “exacted,” and the like. They are insufficient, being conclusions of law merely. Such general allegations avail nothing. They are idle declarations, and not “*constitutive*” under the new code (§ 481, subd. 2). Butler v. Viele, 44 Barb. 166; Lefler v. Field, 52 N. Y. 622; Dubois v. Hermance, 56 Id. 674.

W. W. Mac Farland (O'Dwyer & Noonan, attorneys), for plaintiff.

VAN VORST, J.—In this action two causes are improperly united:

One growing out of an arrangement made with Foster as the agent of the American Newspaper Union, and the other as agent of “A. N. Kellogg's List.”

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There is no statement connecting "Kellogg's List," with the American Newspaper Union. For all that appears, they are entirely separate and distinct organizations. The American Newspaper Union is not liable for any damage incident to a breach of any agreement between plaintiff and Kellogg's List or its agent. In this cause the complaint is demurrable.

I have already held, in the case of this same plaintiff against the American Newspaper Union and others, that the omission to make the original co-incorporations defendant is no valid objection.

It is alleged to be a corporation. As such it was the representative of its incorporators in the action.

And for this reason I think it was improper to make the defendant, The New York Newspaper Union, a party defendant.

The allegation is, that the several corporations named constituted the "American Newspaper Union," of which Foster was agent.

In that view, the redress of the plaintiff is in the first instance against that corporation. No cause of action is therefore stated against the New York Newspaper Union upon which the plaintiff could recover in this action.

There should be judgment in favor of the defendant demurring, with liberty to plaintiff to amend upon payment of costs.



Brainerd v. Bertram.

BRAINERD v. BERTRAM.

N. Y. Supreme Court, First Department; General Term, October, 1878.

PLEADING.—PARTIES PLAINTIFF.—DEMURRER TO COMPLAINT.—CODE OF CIV. PRO. § 448.

The fact that a partnership consists of more than forty members, residing in different counties, does not authorize an action to be brought in the name of one of the partners, for the benefit of all. A *managing* partner has no legal right to bring an action in his own name for the recovery of an indebtedness to the copartnership.

Appeal by plaintiff from an order sustaining a demurrer to a complaint.

This action was brought by Erastus Brainerd against Louis G. Bertram and others upon a promissory note.

The defendant Bertram demurred to the complaint on the grounds that it did not state facts sufficient to constitute a cause of action; that there was a defect of parties plaintiff; and that the plaintiff had not legal capacity to sue.

The demurrer was sustained by the court at special term, on the following opinion.

“VAN VORST, J.—The plaintiff avers in his complaint, that Brainerds & Co. are copartners; that the members of the partnership are very numerous, to wit, more than forty in number; that they reside in different countries, and that it is impracticable to bring them all before the court in this action, and that the plaintiff is the managing partner, wherefore he sues for the benefit of all the members.

“The fact that the plaintiff is the managing partner gives him no legal right to bring an action in his own

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name for the recovery of an indebtedness to the co-partnership.

"The general rule is, that every action must be prosecuted in the name of the real party in interest (*Code*, § 111), except as provided in section 113. This section provides, that an executor or administrator, or a trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted. But the plaintiff stands in no such relation.

"Section 119 provides, that those who are united in interest must be joined as plaintiffs, but when the parties are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the others. It is under this section, doubtless, that the plaintiff has ventured to bring this action in his own name. But I do not think that the plaintiff's case is of the character contemplated by the exception in the closing part of section 119. It is not impracticable to bring in, as plaintiffs, all the partners. And I think the defendant has the right to demand that those united in interest should be named as plaintiffs, and that they should take the responsibility of the litigation. The demurrer is sustained. But plaintiff is at liberty to amend upon the usual terms."

From the order entered thereon, the plaintiff appealed to the general term.

John Hayes, for appellant.—The second ground of demurrer is insufficient in not specifying the particular defect complained of (*Skinner v. Stuart*, 13 *Abb. Pr.* 442; *People ex rel. Lord v. Crooks*, 53 *N. Y.* 648; *Code of Civ. Pro.* §§ 448, 488, 490; *Code of Pro.* §§ 119, 122; *Wallace v. Eaton*, 5 *How. Pr.* 99). The allegations of the complaint as to the character in which plaintiff sues are to be taken as admitted by the defendant demurring

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(Cutler v. Wright, 22 N. Y. 472); and being admitted, the plaintiff has clearly brought himself within the provisions of section 119 of *Code of Pro.* and has made out a *prima facie* cause of action. The plaintiff has legal capacity to sue (Le Page v. McCrea, 1 Wend. 164; Chapin v. Clemitson, 1 Barb. 311; Cunningham v. Littlefield, 1 Edw. Ch. 104; Green v. Elmer, 8 N. Y. 422; Briggs v. Smith, 4 Daly, 110, and cases cited; Myers v. Machado, 6 Abb. Pr. 198). The provisions of the code are equally applicable to all manner of actions, whether legal or equitable (*Code of Pro.* § 69; Kirk v. Young, 2 Abb. Pr. 453). Copartners can avail themselves of the provision (Jones v. Felch, 3 Bosw. 66; McKenzie v. L'Amoreaux, 11 Barb. 516); or any party united in interest with others, so numerous that it would be impracticable to bring them all in, or if brought in, to prevent the suit being continually abated by death or a change of interest (Smith v. Lockwood, 1 Code R. N. S. 319; Wood v. Draper, 4 Abb. Pr. 322; Bouton v. City of Brooklyn, 15 Barb. 375; Roosevelt v. Varnum, 12 How. Pr. 469; Towner v. Tooley, 38 Barb. 598; Greene v. Breck, 10 Abb. Pr. 42; Brooks v. Peck, 38 Barb. 519; Habicht v. Pemberton, 4 Sandf. 657). The exception to the general rule in the U. S. courts, that all persons interested must be made parties, is restricted to those whose interests are in the issue and to be affected by the decree (Cases cited above; and Mechanics' Bank v. Seton, 1 Pet. 299, 306; Mandeville v. Riggs, 2 Id. 482).

Henry Ferris, for respondent.—The names of the parties should be set forth in the title or in the body of the complaint (Hill v. Thacter, 3 How. Pr. 407; Stanley v. Chappell, 8 Cow. 235). In stating the names of the parties it is not necessary to add any description (Sheldon v. Hoy, 11 How. Pr. 15; Merritt v. Seaman, 6 N. Y. 168). Section 119 of the Code of Procedure ap

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plies to cases where the parties are very numerous, and it is impracticable to bring them all before the court, and that fact should distinctly appear before the complaint can be upheld (*Smith v. Lockwood*, 13 *Barb.* 218; *Wood v. Draper*, 4 *Abb. Pr.* 322; *Kirk v. Young*, 2 *Id.* 453). The plaintiff has not legal capacity to sue (*Russell v. Clapp*, 7 *Barb.* 482; *Bentley v. Jones*, 4 *How. Pr.* 202; *McMurray v. Gifford*, 5 *Id.* 14; *Parker v. Totten*, 10 *Id.* 233; *Thomas v. Desmond*, 12 *Id.* 321; *Freeman v. Fulton Fire Ins. Co.*, 14 *Abb. Pr.* 407; *Bank of Lowville v. Edwards*, 11 *How. Pr.* 216; *Johnson v. Kimp*, *Id.* 186; *Bank of Havana v. Wickham*, 16 *Id.* 97). A cause of action is the right a party has to institute and carry through a proceeding (*Meyer v. Van Collem*, 28 *Barb.* 231). Where it appears on the face of the complaint, that the subject of the action, though in possession of the plaintiff, is nevertheless the property of another, the complaint does not state a cause of action in the plaintiff (*Palmer v. Smedley*, 6 *Abb. Pr.* 463; *S. C.*, 28 *Barb.* 468; *People v. Booth*, 32 *N. Y.* 397; *Myers v. Machado*, 14 *How. Pr.* 149; *S. C.*, 6 *Abb. Pr.* 198).

[The order of the special term was affirmed by the general term on the foregoing opinion of VAN VORST, J.]

HAMMOND v. EARLE.

N. Y. Supreme Court, First Department; Special Term and Chambers, September, 1878.

Again, November, 1878.

ANSWER.—MAKING MORE DEFINITE AND CERTAIN.—PLEADING.—
CODE OF CIV. PRO. § 546.

It is not essential that a motion to make a pleading more definite and certain, be made at the earliest possible moment, but where the

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time "to plead, or otherwise move," has been extended, it may be made at any time before the expiration of such extension.

An answer, which "denies each and every material allegation" in the complaint, "contrary to or inconsistent with any of the allegations in the foregoing answers, not heretofore admitted, ignored, or denied," is too indefinite.

The plaintiff, as well as the court, is entitled to know what allegations of his complaint are denied; and he cannot be compelled to run the risk of different interpretations of language which would in the one case result in an admission, and in the other in a denial.

Motion by plaintiff to compel defendant to make a defense more definite and certain.

This was an action by William A. Hammond against William P. Earle and Elmore P. Ross, for an injunction to stay the sale under foreclosure of certain premises in the city of New York; for specific performance of a contract; that a mortgage be adjudged no longer a lien on said premises; and for damages for breach of contract.

The fifth defense in the amended answer of the defendant Earle was as follows: "And this defendant as and for a separate answer and fifth defense to the action of the plaintiff herein, on information and belief, denies each and every material allegation in said amended complaint, contrary to or inconsistent with any of the allegations in the foregoing answers, not heretofore admitted, ignored or denied."

The plaintiff's attorney obtained an order from DANIELS, J., granting plaintiff "twenty days further and additional time to plead to or otherwise move in respect to said Earle's answer."

Thereafter the plaintiff made this motion, under section 546 of the Code of Civil Procedure, to compel the said defendant Earle to make this fifth defense more definite and certain.

Chauncey B. Ripley, for the motion.—I. The answer in question is indefinite and uncertain, as appears

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upon the face of it, in that it affords the plaintiff no means of determining, with any degree of precision, what allegations of the complaint are denied.

II. A denial in an answer should be so expressed by its words, that any person of intelligence can determine, with accuracy, what allegations of the complaint are intended to be denied (*Mattison v. Smith*, 19 *Abb. Pr.* 288; *Seward v. Miller*, 6 *How. Pr.* 312; *Code of Civ. Pro.* § 546).

III. As to laches, see order of DANIELS, J., giving twenty days additional time to plead or otherwise move; and *Lackey v. Vanderbilt*, 10 *How. Pr.* 155.

John M. Martin, opposed.

VAN BRUNT, J.—The time to make this motion was extended by Judge DANIELS' order so that it was made in time. The fifth defense seems to me entirely too indefinite; it is wholly bad for a reason which has not been raised upon this motion, and which therefore it is not necessary for me to discuss.

The plaintiff is entitled to know what allegations of his complaint are denied, and the court is entitled to the same information. The plaintiff can not be compelled to run the risk of different interpretations of language which would in the one case result in an admission and in the other in a denial. Rule 19 of the court requires a *memorandum* upon the pleadings submitted to the court to note what parts of the complaint are admitted, &c. To make the pleader comply with this rule, the denials must be specific, certain and definite.

To deny on information and belief every material allegation of the complaint contrary to or inconsistent with any of the allegations of an answer not therein before admitted, ignored or denied, is a denial which may deny everything or nothing. Where the pleader claims to have ignored, no one can know but himself.

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Clearly, such a denial is too indefinite to be allowed to stand.

Motion granted, with ten dollars cost to abide the event.

II. *November, 1878.*

Motion to make amended answer more definite and certain.

Defendant served an amended answer, the material part of which read as follows :

“5th Defense. And this defendant further answering denies each and every material allegation in said amended complaint not hereinbefore specifically admitted or denied.”

The plaintiff then made this motion, as stated in the notice of motion, that the said fifth defence “be made more definite and certain so as to show precisely what allegations of the amended complaint are denied by said fifth defense or answer, as the practice requires, and the said amended answer be ordered amended further accordingly.”

The grounds thereof were, that the answer was indefinite and uncertain in that it did not disclose which allegations in the complaint were denied; that it was evasive and wanting in precision as to which allegations were regarded as material, and as to what the standard of materiality was in the mind of the defendant pleading; also that the fifth defense was rendered especially indefinite and uncertain when considered in connection with other portions of the same pleading.

Chauncey B. Ripley, for motion.—I. A denial, in the language of the statute, of each and every material allegation of the complaint, is evasive and obnoxious to a motion that it be made more definite and certain.

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(Mattison v. Smith, 19 Abb. Pr. 288; Seward v. Miller, 6 How. Pr. 312; Code of Civil Procedure, § 546; Rule 19 Supreme Court, p. 65). The determination of the question of materiality involves abstract principles, and in answering it a great diversity of views might be developed alike by the parties and the court.

II. Since much of the matter contained in the answer can in no sense be regarded either as specific admissions or specific denials, the answer must be held grossly complicated, indefinite and uncertain in the use of the language employed, if we expunge from it the qualifying word "*material*." It is too complicated for the court or counsel to interpret, and the proper remedy is by motion to make more definite (Greenfield v. Mass. Mut. Life Ins. Co., 47 N. Y. 431, 437). In condemnation of this mode of pleading, see *Pomeroy's Remedies and Remedial Rights*, § 635, and Rule 19, *supra*.

John M. Martin, opposed.—I. By section 519 of Code of Civil Procedure the allegations of a pleading must be liberally construed. The allegation in the answer is a form of denial permitted by section 500 of the Code of Civil Procedure, whether liberally or strictly construed, and in the present case a liberal construction should be given to the answer with a view to substantial justice between the parties.

II. This form of answer is almost universally used by the profession, and has been recognized by court and counsel as sufficient and proper in numerous cases, of which the following are only a few: Walsh v. Mehrback, 5 Hun, 448; Allis v. Leonard, 46 N. Y. 688; Thompson v. Erie R. R. Co., 45 Id. 468; Merchant's Nat. Bank v. Macnaughton, 1 Abb. New Cas. 293, note. And in the following cases, it has been *directly held* to be good under the old code, the language of which does not materially differ from that of the new one:

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Genesee Mut. Ins. Co. v. Moynihen, 5 *How Pr.* 321; Parshall v. Tillou, 13 *Id.* 7; Gassett v. Crocker, 9 *Abb. Pr.* 39.

III. There is nothing indefinite in the answer. It points out specifically what allegations in the amended complaint are denied, to wit: "Each and every one not before specifically admitted or denied."

IV. The former answer held to be bad by VAN BRUNT, J., differs materially from the one now before the court. In that the denial was *on information and belief*, which was a fatal defect (*Therasson v. McSpedon*, 2 *Hilt.* 1; *Powers v. Rome, &c. R. R. Co.*, 5 *Sup'm Ct. [T. & C.]* 449). It was also defective in denying what had been ignored, and it is submitted that that decision is inapplicable, and has no force here.

LAWRENCE, J.—The motion to make the answer more definite and certain, as stated in the notice of motion, is granted, with costs to abide the event (See *Mattison v. Smith*, 19 *Abb. Pr.* 288; *Old Code*, § 149; *New Code*, § 500; MSS. opinion of VAN BRUNT, J., in this case).*

MONTEJO v. OWEN.

U. S. Circuit Court, Southern District of New York,
1877.

DEMURRER TO ANSWER.—ACTION UPON A JUDGMENT.—EQUITABLE DEFENSES IN COMMON LAW ACTIONS.—U. S. REV. STAT. § 914.

In the jurisprudence of the United States the distinction between legal and equitable rights and suits is one of substance as well as of form and procedure.

* *Ante*, p. 107.

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Under section 914 of the U. S. Revised Statutes, an affirmative equitable right to relief cannot be set up in an action at common law in the United States circuit court, although permissible under the law of procedure of the State where the action is brought.

Demurrer to an answer.

This action was brought by Francisco Montejo and another against Thomas J. Owen and others on a judgment recovered by the former against the latter in the city of New Orleans.

The complaint set up, as its cause of action, the recovery of the New Orleans judgment.

The answer stated that, in the year 1868, the defendants advanced money to the plaintiffs to pay for certain machinery; that in 1869 the defendants brought suit against the plaintiffs for this money in New Jersey and attached certain real estate there; that soon after, an account was stated between the parties, by which it appeared that \$35,000 were due the defendants; that thereupon plaintiffs gave defendants a second mortgage for that amount on the said real estate in order to have the said suit discontinued; that soon after, the machinery, for the purchase of which the indebtedness accrued, was, at the plaintiffs' request, transferred by them to the defendants, in order that it might appear to be their property, and thus avoid confiscation on the island of Cuba, where the plaintiffs were likely to be regarded as rebels; that the plaintiffs retained possession of the machinery, treated it as their own, sold, pledged, or disposed of it, and never communicated or consulted with the defendants on the subject until upwards of one year after they had disposed of it, when they appear to have called their attention to the fact, only because they experienced some difficulty in collecting the amount of the purchase money from the buyer; that during this whole period the defendant was uninformed of their doings with reference to this machinery; that the first mortgage on the New Jersey

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property had been foreclosed, and the land sold, and had realized a sum sufficient fully to pay the first mortgage and to leave a balance, applicable to the defendants' mortgage of \$28,432.42, which was credited upon the outstanding account between defendants and the plaintiffs, and left the latter in defendants' debt in the sum of \$12,389.98; that the plaintiffs having failed to visit New York, as it had theretofore been their practice, or to pay the aforesaid balance, the defendants brought action against them in the city of New Orleans, in the circuit court, the forum of their (the plaintiffs') domicile, to recover it; that the trial resulted—the defendants being absent—in a verdict for the plaintiffs for \$16,130.16, with interest; that the court should compel the plaintiffs to account or the defendants would be remediless; that the facts above stated could not have been presented under the pleadings in the former trial in a court of law; and that at the time of said trial they were not fully informed of the facts above stated, and had no means at the time of procuring the information required to lay before the court and jury a full and fair statement of all the acts and doings of said plaintiffs, nor could they procure a discovery of the facts in the possession of the plaintiffs relating to their dealings with said machinery or to their accounts, except by proceedings in the nature of a suit in equity, where all the rights and equities of the parties might be adjusted and disposed of.

To this answer the plaintiffs demurred for insufficiency in not stating facts sufficient to constitute a defense or counter-claim.

Granville P. Hawes, for plaintiffs.—The defendants cannot set up an equitable defense in an action at law in this court (*Lessee of Baird v. Wolfe*, 4 *McLean*, 552; 1 *Stat. at L.* 94; *Robinson v. Campbell*, 3 *Wheat.* 212; *Loring v. Donner*, *McA.* 360; *Jones v. McMasters*,

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20 *How.* 22; *Bennett v. Butterworth*, 11 *Id.* 666; *Thompson v. Railroad Companies*, 6 *Wall.* 134; *McFaul v. Ramsey*, 20 *How.* 526; *Meyers v. Grier*, *McA.* 401, 402; *Fenn v. Holme*, 21 *How.* 481; *U. S. R. S.* § 914; 1 *Abb. U. S. Prac.* 249; *Republic Ins. Co. v. Williams*, 3 *Biss.* 371; *Blease v. Garlington*, 2 *Olto*, 1, 8). The answer discloses no equitable defense (*Maxwell v. Stewart*, 22 *Wall.* 77; *Christmas v. Russell*, 5 *Id.* 304; *Dobson v. Pearce*, 12 *N. Y.* 156; *Randolph v. King*, 2 *Bond*, 104; *Stillwell v. Carpenter*, 59 *N. Y.* 423; *Smith v. Nelson*, 62 *Id.* 289; *Ross v. Wood*, 8 *Hun*, 185; *Krekeler v. Ritter*, 62 *N. Y.* 375). If the Louisiana practice prevailed in the United States court, then he might have set up any matter in reply to the plea in reconvention (*Spinney v. Hyde*, 16 *La. An.* 250; *Mead v. Buckner*, 2 *La.* 284; 6 *N. S.* 611 [9 *Martin*]; 2 *Hennen Dig.* 1,175; 3 *L. R. O. S.* 100; 5 *A. R.* 3).

F. R. Coudert (*Coudert Brothers*, attorneys), for defendants.—This is an action at law, and the answer cannot change it, and therefore the act of 1872, § 914, applies. Although the general complexion of the answer is equitable, there is enough to make a legal defense to the claim, and it is good under the decisions in this State (*Dobson v. Pearce*, 12 *N. Y.* 156, 165; *Reigal v. Wood*, 1 *Johns. Ch.* 402; *McDonald v. Neilson*, 2 *Cow.* 139; *Duncan v. Lyon*, 3 *Johns. Ch.* 351; *Marine Ins. Co. of Alexandria v. Hodgson*, 6 *Cranch*, 206; *Shottenkirk v. Wheeler*, 3 *Johns. Ch.* 275; 2 *Story Eq. Jur.* §§ 887, 896; *Huggins v. King*, 3 *Barb.* 616; *Code*, § 69). As this court has the power, and is required to conform to the existing State practice, it will do so as far as practicable (*Republic Ins. Co. v. Williams*, 3 *Biss.* 371). No right of the plaintiffs is destroyed or impaired in any way by the interposition of the defense submitted to the court (*Goulet v. Asseler*, 22 *N. Y.* 228, 229; *N. Y. Life Ins. Co. v. Supervisor of N. Y.*, 4 *Duer*, 192; 1 *Abb. Pr.* 250; *Eldridge v.*

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Adams, 54 *Barb.* 417 ; Hale v. Omaha Nat. Bank, 7 *J. & S.* 207 ; Thompson v. R. R. Co., 6 *Wall.* 134). The act of 1789 (1 *Stat. at L.* 276) was only intended to regulate processes ; there was no provision to assimilate either the practice or the pleadings of the State and federal courts. The act of 1872 is broader and more general in its spirit than the preceding acts, and a real, substantial and comprehensive change was intended by it—provided, such change were necessary in order to conform the federal practice to the State practice, and that the innovation could be made effectual without impairing any constitutional right ; hence the force and relevancy of decisions made before 1872 disappear.

JOHNSON, J.—This case comes up on a demurrer by the plaintiffs to the answer of the defendants.

The action is upon a judgment rendered by the circuit court of the United States for the district of Louisiana, in favor of the present plaintiffs against the present defendants. The answer sets up a variety of matters which are not defenses at common law against the judgment, but which are claimed to give the defendants an equitable right to prevent the enforcement of the judgment.

These matters the defendants insist are available to them as a defense in this suit by force of section 914 of the revised statutes of the United States.

That section prescribes that "The practice, pleading, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform as near as may be, to the practice, pleadings and forms, and modes of proceeding existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of court to the contrary notwithstanding."

It must be assumed that in a suit upon a judgment

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brought in a court of the State of New York the defense set up in the answer in this suit, would be available by way of answer if sufficient in substance to entitle the party to relief against the judgment. Such is the known and established law of procedure in the State of New York, introduced by sections 69, 150 and 167 of its code of procedure. The first of these abolishes the distinction between actions at law and suits in equity, and the forms of all such actions and suits theretofore existing, and declares that thereafter there shall be in that State but one form of action. The next section cited enacts that the defendant may set forth by answer as many defenses and counter-claims as he may have, whether they be such as had theretofore been denominated legal, or equitable, or both.

The last section named enacts that the plaintiff may unite in the same complaint several causes of action, whether they be such as have been heretofore denominated legal or equitable, or both, under certain specified conditions.

These sections of the code deal with claims legal and equitable, and defenses legal and equitable set up by answer, and counter-claims of both characters.

In pursuance of the policy thus indicated, section 274 provides that judgment may be given for or against one or more of several plaintiffs and for or against one or more of several defendants, and it may determine the ultimate rights of the parties as between themselves, and it may grant to the defendant any affirmative relief to which he may be entitled.

It is of course obvious that this system, while it undertakes to provide for the means of administering indiscriminately legal and equitable remedies in substance founded upon legal and equitable rights, completely ignores all the former schemes of procedure founded on the recognition of their differences.

Now, from the provision of section 914 of the United

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States revised statutes, which is already set forth, equity and admiralty causes are completely excluded in terms. That section does not relate to them, except to effect such exclusion. The jurisprudence of the United States has recognized this distinction, in numerous cases, as one of substance, as well as of form and procedure (*Robinson v. Campbell*, 3 *Johns.* 212; *Bennett v. Butterworth*, 11 *How.* 669; *McFaul v. Ramsey*, 20 *Id.* 526; *Jones v. McMasters*, *Id.* 22; *Fenn v. Holme*, 21 *Id.* 481; *Thompson v. Railroad Company*, 6 *Wall.* 134). In the last case cited, Mr. Justice DAVIS says, giving the opinion of the court: "The constitution of the United States and the acts of Congress recognize and establish the distinction between law and equity.

"The remedies in the courts of the United States are, at common law or in equity, not according to the practice of State courts, but according to the principles of common law and equity as distinguished and defined in that country from which we derive our knowledge of these principles. And although the forms of proceedings and practice in the State courts shall have been adopted in the circuit courts of the United States, yet the adoption of the State practice must not be understood as confounding the principles of law and equity, nor as authorizing legal and equitable claims to be blended together in one suit."

In the case of *Bennett v. Butterworth*, above cited, Chief Justice TANEY said, "The constitution of the United States, in creating and defining the judicial power of the general government, establishes this distinction between law and equity; and a party who claims a legal title must proceed at law, and may undoubtedly proceed according to the forms of practice in such cases in the State court. But, if the claim is an equitable one, he must proceed according to the rules

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which this court has prescribed regulating proceedings in equity in the courts of the United States."

"That these discriminations between legal and equitable rights and suits are substantial in the jurisprudence of the United States is further apparent from provisions of the statute law, as well as from the decision of the courts. Under section 721 of the revised statutes the laws of the several States, with certain exceptions, must be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply; while, on the other hand, the law of equity in the courts of the United States is one and the same in every State, not dependent upon local law."

"Wherever a case in equity may arise and be determined under the judicial power of the United States, the same principles of equity must be applied to it, and it is for the courts of the United States, and for this [supreme] court in the last resort, to decide what those principles are, and to apply such of them, to each particular case, as they may find justly applicable thereto" (*Neves v. Scott*, 13 *How.* 270).

Nor are the statutes silent as to the forms and modes of procedure in suits of equity. Section 913 of the revised statutes declares that they shall be according to the principles, rules and usages which belong to courts of equity, except as modified by statute, or rules made in pursuance of statute, or by the supreme court.

That court has accordingly prescribed a body of rules regulating very largely and comprehensively the practice in equity.

It is claimed that inasmuch as the present action is one to enforce a judgment, and therefore not an equity cause, the procedure is to be conformed to that of the State courts upon such a cause of action; and that as those courts allow an equitable right to set aside or re-

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strain the execution of such a judgment by way of answer, the courts of the United States must conform to that rule.

But this is a mere confusion of names. This so-called defense is an affirmative equitable right to the relief asked. It, under the cases and statutes cited, is to be admitted under the equitable principles and according to the equitable procedure of the courts of the United States. In that respect the procedure cannot be conformed to the State practice without overthrowing the whole scheme for the administration of equity in the courts of the United States. The action is at common law, the defense is substantially an action in equity, and it cannot, because it assumes the guise of an answer or defense under the State law, escape from the control of the laws of the United States as to the modes of enforcing equitable rights.

The demurrer must be sustained and judgment given for the plaintiffs, with leave to defendants to amend on payment of costs within twenty days.

CHAPMAN v. PHOENIX NATIONAL BANK OF
NEW YORK.

N. Y. Superior Court; General Term, May, 1878.

ACTION IN REM.—CONFISCATION OF PROPERTY OF REBELS.—JURIS-
DICTION OF COURTS.—JURISDICTION OF U. S. DISTRICT
COURTS.—RES ADJUDICATA.

Where a court has no jurisdiction to pronounce a decree at the time it was made, it will not become valid by the denial of a motion to open it, and such a denial will not constitute *res adjudicata* so as to bar a subsequent action.

Want of jurisdiction renders void the judgment of any court; and

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the bare recital of jurisdictional facts in the record of a judgment of any court is not conclusive, but only *prima facie* evidence of the facts recited ; so that a party against whom a judgment is offered, is not, by the bare fact of such recitals, estopped from showing by affirmative facts that they were untrue.

When a statute prescribes that some fact must exist before jurisdiction can attach in any court, such fact must exist before there can be jurisdiction.

But where general jurisdiction depends, in a particular case, upon facts to be determined by evidence, and it is required to act upon such evidence, its decision upon its jurisdiction is conclusive until reversed, revoked, or vacated, so far as to protect its officers and all innocent persons who act upon the faith of it.

The jurisdiction of the district courts of the United States over the confiscation of property of rebels against the government, does not depend upon the fact of the commission of the offense, but embraces the power to hear and determine all cases arising under the statutes providing therefor.

If in any case it shall be *found* that the property brought before the court belongs to a person guilty of an offense under the act, it may be condemned.

Hence, where all the proceedings and formalities required by law and necessary to give the district court jurisdiction and render its decision binding, were had and complied with,—*Held*, that the decree of condemnation could not be impeached in another court.

Appeal by the plaintiff from a judgment rendered at special term.

The action was brought March 9, 1870, by Verina S. M. Chapman against the Phoenix National Bank of the City of New York, to recover certain dividends declared between June 1, 1861, and February 1, 1870, upon 84 shares of the capital stock of the Phoenix Bank, and upon the same stock of the Phoenix National Bank, into which the Phoenix Bank became merged.

On January 8, 1859, the plaintiff (then Verina S. Moore), who resided in North Carolina, owned the said 84 shares, and the bank issued to her a certificate therefor, which the plaintiff has retained ever since. In 1861 she was married to the Rev. Robert H. Chapman, D. D., and has ever since continued to be his wife. During

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the late civil war she resided in the southern States, cut off from all communication with the north.

No demand was ever made by the plaintiff for any of the dividends in suit until a short time before the commencement of the action.

The dividends declared between June 1, 1861, and March 1, 1864, remained in the possession of the defendant until March 31, 1864, when, in compliance with the decree of the district court of the United States for the southern district of New York, condemning them and the stock on which they had been declared, as forfeited to the United States, the same were paid to the clerk of said court.

The proceedings by which the stock and dividends were condemned as forfeited to the United were as follows :

First. Robert Murray, Esq., the marshal of the United States for the southern district of New York, on February 24, 1864, by and under the authority of the president of the United States, and in obedience to the instructions of the attorney-general of the United States and to the directions of the district-attorney of the United States for the southern district of New York, and in pursuance of the act of congress entitled "An Act to confiscate property used for insurrectionary purposes," approved August 6, 1861, and of the act of congress entitled "An Act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes," approved July 17, 1862, seized the said stock and dividends to the end that the same might be confiscated, forfeited and condemned, as required and provided in the said acts of congress.

Second. After the seizure a libel of information was filed and a monition was duly issued, and the marshal in obedience to the monition attached the

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property, and gave due notice as required by law and made due return.

Third. After the return of the marshal, the decree of condemnation was made and entered. The defendant, upon being served with a certified copy of the decree, on or about March 31, 1864, directing it so to do, canceled the stock certificate of said 84 shares on its books, and issued a new certificate for a like number of shares in its stead, to George F. Betts, Esq., clerk of said court, and paid to said clerk said unpaid dividends.

Afterwards said stock was duly sold by virtue of said decree, and in pursuance of a writ of *venditioni exponas*, to other parties who had said stock transferred on the defendant's books, and they afterwards received the dividends thereon, the same having been paid to them before the commencement of this action.

On or about March 12, 1869, the plaintiff petitioned the said United States district court to set aside said decree and said sale, and that the plaintiff might be allowed "to come in and defend said proceedings," on the ground that the allegations in the libel of information concerning the plaintiff's rebellious acts were untrue, which is substantially the same question which the plaintiff is seeking to litigate in this action.

The application for relief upon the petition was made on notice to the United States and to the defendant, and after hearing counsel for the respective parties the prayer of the petition was denied.

The plaintiff then brought this action.

Upon the trial by the court at special term without a jury, the defendant had judgment for a dismissal of the complaint on the merits, and plaintiff appealed.

James S. Stearns, for appellant.

Edgar J. Van Winkle, for respondent.

BY THE COURT.—FREEDMAN, J.—This action is

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sought to be sustained on the theory that the plaintiff had no notice or knowledge of the proceedings instituted in the United States district court, which resulted in the decree of condemnation ; that said proceedings were founded upon alleged offenses on the part of one Ver. S. Moore, of which the plaintiff was wholly innocent, and that consequently the decree of the United States district court was made without jurisdiction and is void.

If that court had no jurisdiction to pronounce the decree at the time it was made, the decree could not become valid by the denial of the motion to open it, and such denial does not constitute *res adjudicata* so as to bar this action.

As to the question of jurisdiction, it is true that want of jurisdiction renders void the judgment of any court, whether it be of superior or inferior, of general, limited, or local jurisdiction, or of record or not ; and the bare recital of jurisdictional facts in the record of a judgment of any court, whether superior or inferior, of general or limited jurisdiction, is not conclusive, but only *prima facie* evidence of the facts recited ; and a party against whom a judgment is offered is not, by the bare fact of such recitals, estopped from showing by affirmative facts that they were untrue.

But the difficulty is to find and determine the conditions upon which the jurisdiction of the district courts of the United States, in this class of cases, depends.

When a statute prescribes that some fact must exist before jurisdiction can attach in any court, such fact must exist before there can be jurisdiction, and the court cannot acquire jurisdiction by erroneously deciding that the fact exists and that it has jurisdiction. But where general jurisdiction is given to a court over any subject, and that jurisdiction depends, in a particular case, upon facts which must be brought before

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the court for its determination upon evidence, and where it is required to act upon such evidence, its decision upon the question of its jurisdiction is conclusive until reversed, revoked or vacated, so far as to protect its officers and all other innocent persons who act upon the faith of it (*Roderigas v. East River Savings Institution*, per EARL, J., 63 *N. Y.* 460, 464), and cases there cited.

War gives to the sovereign the right to take the persons and confiscate the property of enemies wherever found. This rigid rule still exists, though the exercise of the right may have been, more or less, affected by the humane policy of modern times. The right to condemn and confiscate the property of enemies captured on the high seas exists by the law of nations. But before the courts of the United States can condemn and confiscate, as a consequence of the declaration of war, any property of the enemy found on land at the commencement of hostilities, provision must first be made by law for that purpose. The right to enact such a law exists, and when the sovereign authority of the United States shall choose to bring it into operation, the judicial department must give effect to its will. But until that will shall be expressed, no power of condemnation can exist in any of the courts (*Brown v. United States*, 8 *Cranch*, 110).

The power of congress to enact laws for such a purpose has been reviewed and affirmed in the case of *Miller v. United States*, 11 *Wall.* 268.

In the exercise of this power congress enacted the act of August 6, 1861, entitled, "An Act to confiscate property used for insurrectionary purposes;" and the act of July 17, 1862, entitled, "An Act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes."

The act of 1861 applies only to property acquired

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with intent to use or employ the same, or to suffer the same to be used or employed, in aiding or abetting insurrection, or in resisting the laws; and the act of 1862, so far as it relates to the confiscation of property, applies only to the property of persons who *thereafter* might be guilty of acts of disloyalty or treason (Conrad v. Waples, 96 U. S. [6 Otto] 279).

By these acts it was further provided that for the offenses therein set forth the property of the persons so offending should be condemned and forfeited to, and become the property of the United States, and that the district courts of the United States should have jurisdiction to carry out the purposes of said acts so as to secure the condemnation and sale, for the benefit of the United States, of the property thus liable to seizure, condemnation and sale.

For the purposes of the present appeal it is immaterial whether the title of the offender is transferred to the United States by his guilty act, as has been held in United States v. Stevenson (3 Ben. 119), or pursuant to judicial sentence of condemnation, for in every case the property claimed must be seized and brought into court before it can be finally condemned and applied as directed by said acts.

The question then remains whether the jurisdiction of the courts of the United States to entertain proceedings for condemnation, depends exclusively upon the fact of the commission of the offense, or whether it includes the general power to inquire and determine whether an offense has been committed, and to pronounce judgment according to the fact as it may be made to appear. This question must be determined upon the construction of said acts and in accordance with the general legislative intent apparent from their enactment. In addition to the provisions already referred to, the act of 1861 provides that all property liable to capture under it, shall be lawful subject of

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prize and capture wherever found ; that it shall be the duty of the president of the United States to cause the same to be seized, confiscated and condemned ; that the attorney-general or any district attorney of the United States may institute the proceedings for condemnation, in which case they shall be wholly for the benefit of the United States ; or any person may file an information with such attorney, in which case the proceedings shall be for the use of such informer and the United States in equal parts ; and that such prizes and capture shall be condemned in the district or circuit court of the United States having jurisdiction of the amount, or in admiralty in any district in which the same may be seized, or into which they may be taken and proceedings first instituted.

The act of 1862 makes it the duty of the president of the United States to cause all property liable to seizure and condemnation under said act to be seized and the proceeds thereof to be applied for the support of the army of the United States (§ 5). It also provides, that to secure the condemnation and sale of any such property, after the same shall have been seized, so that it may be made available for the purpose aforesaid, proceedings *in rem* shall be instituted in the name of the United States in any district court thereof, within whose territorial jurisdiction the property, or any part thereof, may have been found or into which the same, if movable, may have been first brought ; that such proceedings shall conform, as nearly as may be, to proceedings in admiralty or revenue cases ; and that, if said property, whether real or personal, shall be found to have belonged to a person engaged in rebellion, or who has given aid or comfort thereto, the same shall be condemned as enemies' property and become the property of the United States, and thereupon it may be disposed of as the court may decree. (§ 7). It further provides, that the said district courts shall

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have power to make such orders, establish such forms of decree and sale, and direct such deeds and conveyances to be executed and delivered by the marshals thereof, where real estate shall be the subject of sale, as shall fitly and efficiently effect the purposes of the act, &c., &c. (§ 8). And finally, the said act confers upon the said courts full power to institute proceedings, make orders and decrees, issue process, and do all other things necessary to carry the act into effect (§ 14).

These provisions, taken together and construed with reference to the purposes therein avowed and also expressed in the titles of the respective acts, it seems to me, unmistakably show that the intention of congress was to provide not only a complete system for the capture and condemnation of property liable to be considered as enemies' property, but also one which should be effective in times of great national peril and commotion, and for that purpose to invest the district courts of the United States with the general power to take cognizance of and inquire into all offenses under said acts. Their jurisdiction is not made to depend upon the fact of the commission of the offense, but embraces the power to hear and determine all cases arising under the statute; and if in any case it shall be found that the property brought before the court belongs to a person guilty of an offense under the said acts, then it may be condemned as enemies' property.

In the case at bar all the proceedings and formalities required by the two acts of congress and necessary to give the district court jurisdiction and render its decision binding, were had and complied with. The proceeding was *in rem*; the property was brought before the court, after seizure by the marshal, a libel of information was filed and a monition duly issued; all persons interested in the said property were cited, in general and special, as the law directs, to answer the

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matters alleged against it, and upon the marshal's return of the monition and proof of such notice, no one intervening, the decree of condemnation was made and entered. The court throughout acted according to its rules and course of practice adopted and promulgated for the disposition of such cases, and hence the decree of condemnation was made in the course of a judicial inquiry in a matter over which the court had jurisdiction. This being so, the decree of condemnation cannot be impeached in any other court. The case comes directly within the principle enforced by the court of appeals in *Roderigas v. East River Savings Institution*, 63 *N. Y.* 460; and reaffirmed in the recent cases of *Lange v. Benedict*, reported 18 *Alb. Law J.* 11, and *Hunt v. Hunt*, referred to in 6 *N. Y. Weekly Dig.* 313.

These authorities being quite conclusive, it is not necessary to refer to the decisions of the supreme court of the United States, to the effect that a decree of a court of competent jurisdiction, on the point in issue before it, can only be reviewed by appeal, except in cases of fraud, and that, while unreversed, it is conclusive upon all other courts, and also that the judgment of a court of the United States, the subject matter of which is within its jurisdiction, cannot be impeached by a State court.

It therefore can make no difference, that the libel of information filed in this case was not verified. It was filed by the district-attorney of the United States for the southern district of New York, in the discharge of his official duty, and under the responsibility of his official oath, and by the rules of the district court for said district libels, filed on behalf of the United States, are excepted from the general requirement that libels praying an attachment *in personam* or *in rem*, or demanding the answer of any party, must be verified by oath or affirmation. This point presents only a ques-

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tion of pleading, or, at most, one of regularity. It does not touch the question of jurisdiction.

Nor can it make any difference that the plaintiff was not actually served with process, and remained ignorant of the proceedings. Service was made in the method prescribed by law in such cases as a substitute for personal service, and this was equivalent to personal service. Similar service is even sufficient in certain personal actions. Thus in *Hunt v. Hunt (supra)*, it was held that in an action for divorce a valid judgment *in personam*, so as to effect a dissolution of the marriage contract which shall be prevalent everywhere, may be rendered against a defendant not within the territorial jurisdiction during the progress of the suit, if that be the place of his citizenship and domicile, though process be served upon him only in some method prescribed by the laws of that jurisdiction as a substitute for personal service, and though he has not voluntarily appeared. In cases like the one at bar the statutes of the United States evidently contemplated the probable necessity of an absolute decree of condemnation against parties who, owing to their residence in distant and rebellious States, might have no opportunity to defend, and suitable provision was made for the contingency. The proceedings are by action *in rem*, in which all parties interested have a right to appear pursuant to the monition issuing from the court. But no personal service or actual notice is necessary.

And, finally, it cannot avail the plaintiff that she is innocent of the alleged offense for which her property was condemned and sold. Assuming that her innocence has been fully established, and that the district court erred in condemning her stock and dividends, such error cannot be rectified by this court. Her remedy is by application to the court that made the decree, or by appeal. Her case, as made out, discloses

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great hardship, especially as she did apply for relief to the district court and the prayer of her petition was denied. But we have no discretion to set aside the decree of the former court by reason of commiseration for her. On the other hand, to sustain plaintiff's claim, even if it could be done, would entail equal hardship upon the defendant. The bank, in this case, has acted solely under the compulsion of the law as pronounced by the district court, and for any other court to compel it, though without fault, to pay a second time, would be introducing a novel principle and a dangerous precedent.

For the same reasons the plaintiff cannot escape from the decree of the district court by insisting that the seizure by the marshal of her stock and the dividends accrued thereon, was not, while she had the actual possession of the certificates, such a manucaption of the property as was necessary to confer jurisdiction upon the court, and that consequently her title could not be changed by judicial sentence in the manner attempted. The act of 1862 applies, in express terms, to "all the estate and property, money, stocks, credits and effects" of the offender (§ 5). Therefore, the questions relating to the sufficiency of the seizure and the liability of the property seized to condemnation, were questions to be determined by the district court according to its course and practice. If they were of a jurisdictional character, the court, in pronouncing judgment, of necessity decided in favor of its jurisdiction, and as, under the statutes referred to and already shown, it had the general power and jurisdiction to inquire into all offenses under said acts, its judgment, standing unreversed, must, under the decisions in *Roderigas v. East River Savings Institution*, and *Hunt v. Hunt* (*supra*), be held conclusive upon these as well as all other questions properly embraced therein.

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At any rate, the seizure, as made, was followed up by the condemnation and sale of the property, the transfer of the stock on the books of the company, and the payment into court of the dividends now claimed, and for these reasons the plaintiff stands confronted not merely with a judicial sentence on paper, but also with the results of the sentence as executed. *Pelham v. Rose*, 9 *Wall.* 103, is not in point. It was an action against a marshal for a false return. He had been commanded to attach a certain note and to detain the same in his custody. For the purpose of determining his liability upon a certain return made by him, it was held that the due and legal service of the writ required him to take the note into his actual custody and control. *Holbrook v. New Jersey Zinc Co.*, 57 *N. Y.* 616, was decided upon the theory that in an action against a corporation by a *bona fide* purchaser for value of certain certificates of its stock, the corporation was estopped from repudiating the terms of transfer to which it had consented upon the face of the certificates. This decision was placed upon grounds of public policy. It turned mainly upon the facts of the case, and was in no wise controlled by the provisions of any statute. The present case, on the other hand, turns entirely upon statutory provisions, which are clear and explicit in themselves and call for their own enforcement in preference to any other principle of law which, but for the existence of the statute, might apply.

The judgment appealed from should be affirmed with costs.

SANFORD, J., concurred.

Gray v. Delaware and Hudson Canal Co.

GRAY v. DELAWARE AND HUDSON CANAL
COMPANY.

N. Y. Supreme Court, Third Department; Circuit,
1878.

TRUSTEE PROCESS. — EXEMPTION FROM EXECUTION. — FOREIGN
JUDGMENT.

Judgment in a regular trustee process in another State is satisfaction when set up in this State against the claim of the person whose claim was thus trustee'd, although, by the law of this State, his claim was exempt from such process at the suit of creditors.

Action for wages. Trial by the court.

This action was brought by Henry Gray against The Delaware and Hudson Canal Company for wages earned by himself and others, his assignors.

During all the time from August 1, 1876, until the commencement of this action, Henry Gray, A. Simmonds, Mitchell Garran and Robert Mercer, were residents of the county of Clinton, in the State of New York, and were each and every one of them householders, and each of them had a family dependent on him for support, and his earnings were necessary for the support of such family.

The defendant, during the time aforesaid, was a corporation duly organized under and by virtue of the laws of the State of New York, and was, during said time, the lessee of, and operating the New York and Canada Railroad, running from Whitehall to Rouse's Point, in the State of New York, and was also the lessee of, and operating the Rutland Division of the Rensselaer and Saratoga Railroad, running from Whitehall, in New York State, to Rutland, in the State of Vermont.

The plaintiff, and the said A. Simmonds, Mitchell Garran and Robert Mercer, as day laborers, performed

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labor and services for defendant in operating the New York and Canada Railroad during certain months of 1876 and 1877.

After the performance of such labor, proceedings were commenced against each of them, in a justice's court in the State of Vermont, in favor of creditors residing in the State of New York, under the laws of Vermont, upon contracts made in the State of New York, and the defendant herein was summoned in each of said actions as trustee of the party defendant in such actions respectively, which proceedings were regular in form according to the statutes of the State of Vermont.

In each of said actions, the writ therein was served upon each of the defendant debtors therein respectively by leaving a true and attested copy thereof in the hands of the defendant herein, as trustee, for each of said defendant debtors, in the manner and as required by section 10, chapter 34 of the laws of Vermont.

The return of the writ in each action showed that the defendant debtor therein had no residence, agent or attorney in the State of Vermont, and that a personal service of said writ on said defendant debtor could not be had.

None of said defendant debtors appeared in said action in person or by attorney.

Each of said actions in Vermont was brought, and the wages of each of said parties so trustee within sixty days after such wages had been earned by said parties respectively, and judgment was entered in each of said actions and executions issued thereon against the defendant herein as trustee (except in the case of Robert Mercer).

And it paid in said several executions to the plaintiff in each of said several actions, the said several sums due to said parties respectively from the defendant, except in the case of said Mercer, in which case

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the money was not paid, but the defendant herein still holds the same. Such judgments were so obtained and the said amounts so paid by defendant herein on such executions without the consent of this plaintiff or his assignors.

Beckwith & Reilly, for plaintiff.—I. The wages trusted in Vermont, having been earned within sixty days before proceedings were commenced, and having been necessary for the support of the family of each of the principal defendants in such proceedings, were exempt, and could not be taken on executions issued from a justice's court in the State of Vermont (*Code of Pro.* § 297).

II. The Vermont court, by service upon the trustee, acquired no jurisdiction over the person of the defendant, as there was no personal service upon defendants, and no appearance by him (*Howard v. Smith*, 35 *Super. Ct. [J. & S.]* 131; *Hill v. Hill*, 28 *Barb.* 23; *Pawling v. Bird's Executors*, 13 *Johns.* 192; *Sheriff v. Smith*, 47 *How. Pr.* 470; *Gibbs v. Queen Ins. Co.*, 63 *N. Y.* 114, 24, 25; *Kerr v. Kerr*, 41 *Id.* 272; *Holmes v. Holmes*, 4 *Lans.* 388; *Robinson v. Ward*, 8 *Johns.* 86; *McGiffert v. McGiffert*, 31 *Barb.* 69; *Vischer v. Vischer*, 12 *Id.* 640).

III. The question of jurisdiction may always be inquired into (35 *Super. Ct. [J. & S.]* 131; *Hoffman v. Hoffman*, 46 *N. Y.* 32; *Borden v. Fitch*, 15 *Johns.* 121-39; *Shumway v. Stillman*, 6 *Wend.* 447; *Dobson v. Pearce*, 12 *N. Y.* 156, 165; *Bradshaw v. Heath*, 13 *Wend.* 407; *McGiffert v. McGiffert*, 31 *Barb.* 69).

IV. The Vermont court having no jurisdiction of the parties, the several judgments are void (*Mills v. Duryee*, 7 *Cranch*, 481; *Shumway v. Stillman*, 6 *Wend.* 447; *Gibbs v. Queen Ins. Co.*, 63 *N. Y.* 109, 124-5; *Borden v. Fitch*, 15 *Johns.* 121, 139).

V. The judgments rendered in Vermont courts were in conflict with the rights of our citizens, and hence

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should not be recognized (*Sherwood v. Judd*, 3 *Bradf.* 419).

Smith M. Weed, for defendant.—I. The court had jurisdiction over the goods, chattels and credits of the plaintiff, and his assignors, being in the State of Vermont, including the amount due to each of them by the Delaware and Hudson Canal Company.

II. The trustee process is a proceeding *in rem*, binding the goods and chattels and credits attached in the State of Vermont (See *General Statutes*, p. 307, § 12). The rule is uniform in this country that the process of State courts extends to all property within its territorial limits. The rule is thus stated in note to *Andrews v. Herriot*, 4 *Cow.* 521.

III. The judgment in Vermont was not in conflict with the rights of our citizens. The exemption of wages earned within sixty days only applies when the creditor seeks the order of the judge under section 297 of the Code in proceedings supplemental to execution. Such wages are liable to attachment under the Code in all cases where an attachment can issue.

IV. The authorities cited by the plaintiff on the question of want of jurisdiction, do not apply to the present case, which is a proceeding *in rem*, and not in *personam*. 28 *Barb.* 23; 41 *N. Y.* 272; 4 *Lans.* 388; 31 *Barb.* 69, and 12 *Id.* 640, were cases of divorce. 13 *Johns.* 192, was a proceeding *in rem*. 47 *How Pr.* 470, and 8 *Johns.* 86, were actions in this State upon judgments reversed in another State, without personal service of process. 63 *N. Y.* 124, 125, recognized the right of a State to extend its laws and process over all the property, &c., within the State (*Spafford v. Page*, 15 *Vt.* 490).

• LONDON, J.—The plaintiff and his assignors were during all the transactions stated in the stipulation reciting the facts, residents of the State of New York, and

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not within the State of Vermont. They, therefore, were not, and could not be, without their consent, personally duly served with process of the courts of Vermont; and since they never by their own acts came within the jurisdiction of that State, the courts of that State could acquire no jurisdiction over their persons, and did not.

The cases cited by the plaintiff amply sustain this position, and it is not controverted by the defendant.

But while the judgment of the Vermont court, rendered under such circumstances, is of no force against the person of the debtor, it may be binding against his property, as a proceeding *in rem*, if his property came within the jurisdiction, and was disposed of by the judgment of the Vermont court, according the laws of that State, and if such judgment is binding and conclusive in the State in which it is rendered, it is binding and conclusive everywhere. If once executed, that execution will be respected (*Cochran v. Fitch*, 1 *Sandf. Ch.* 142; *Holmes v. Remsen*, 4 *Johns. Ch.* 467; S. C., 20 *Johns.* 229; *Embree v. Hanna*, 5 *Id.* 101; *Burrows v. Miller*, 5 *How. Pr.* 52; *Donovan v. Hunt*, 7 *Abb. Pr.* 29; *Andrews v. Herriot*, 4 *Cow.* 521; 1 *Kent Com.* 260, 261, note *b*; 2 *Id.* 119).

It seems that the situs of the debt follows the person of the debtor, so far as to be attachable wherever the debtor is personally present so as to be served with process, unless the debt is evidenced by a written security held by the creditor, in which case the situs of the debt follows the situs of the security (*Osgood v. Maguire*, 61 *N. Y.* 524; *Guillander v. Howell*, 35 *Id.* 657, 661).

The general rule is that any transfer of personal property,—whether voluntary or involuntary, as by trustee process, attachment, bankruptcy and the like,—if valid by the *lex fori*, is valid everywhere; valid by the law of the country in which the transfer is made by

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the force of that law ; valid in other countries where the common law is administered, by the comity of nations and States. But every State protects its own citizens, and will not extend its comity to their hurt ; and, in case of conflict, will prefer its own attachments, judgments, and other methods of protecting its citizens to the operation of the foreign laws (*Willits v. Waite*, 25 *N. Y.* 577 ; *Kelly v. Crapo*, 45 *Id.* 86 ; *Hoyt v. Thompson*, 5 *Id.* 351 ; and will not allow a transfer of visible and tangible property within its jurisdiction, that violates its own laws (*Guillander v. Howell*, 35 *N. Y.* 657) ; but will allow it if the property be merely a debt, not evidenced by a security (*Ib.*, and cases cited on page 661).

It seems in this case the proceedings were had in the nature of trustee process strictly in accordance with the laws of Vermont. The debt was within its jurisdiction, and the defendant was adjudged to pay it, and has obeyed the command which it was impossible for it to avoid or resist. The judgment being valid there, the principles above stated require us to recognize its validity here. It is true this proceeding in the Vermont court deprives the plaintiff of an exemption which our laws accord him ; but justice having been done according to the law and the policy of a sister State, it will not become us to attempt to disregard it by any pretense of superior humanity or wisdom. The defendant having lawfully responded to the demand once, is not to respond again.

People *ex rel.* Bay State Shoe and Leather Co. *v.* McLean.

PEOPLE *ex rel.* THE BAY STATE SHOE AND
LEATHER CO. *v.* McLEAN.

*New York Supreme Court, Second Department ;
Special Term, October, 1878.*

ASSESSMENT.—STRIKING FROM ASSESSMENT ROLL.—FOREIGN COR-
PORATIONS.—PLACE IN WHICH PROPERTY MUST BE ASSESSED.

Foreign corporations are embraced within the provisions of chapter 37 of the laws of 1855, prescribing the manner in which "all persons and associations doing business in the State of New York, and not residents of this State," shall be taxed.

The property of a foreign corporation must be assessed in like manner as if it were a resident, or domestic corporation,—viz., in the town or ward "where the principal office or place for transacting its financial concerns shall be,"—and it cannot be taxed or assessed elsewhere.

A manufacturing corporation, created under and by virtue of the laws of Massachusetts, doing business within this State, and having its "principal office or place for transacting its financial concerns" in the city of New York, had machinery temporarily in another town, where it had been assessed by the assessors of that town. *Held*, that such assessment was erroneous, since the company had no "principal office or place for transacting its financial concerns" within said town.

Where the court is asked to affirm or reverse, correct or modify, the assessment roll, which has been brought before the court, the court may order the officer in whose custody it is, to strike an assessment from the roll.

Certiorari to review an assessment upon the personal property of the relator.

The error alleged was that the defendants, Thomas McLean and others, the assessors of the town of Ossining, county of Westchester, had no power or authority, under section 6, of article 1, title 2, chapter 13, part 1, of the revised statutes, as amended by the laws of 1855, to assess the property of the relator, a foreign corpora-

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tion having its "principal office or place for transacting its financial concerns" in the city of New York, and that such assessment was illegal and void.

The relator is a foreign corporation, created under and by virtue of the laws of Massachusetts, doing business within this State, and having its only "office for transacting the financial concerns of the company," at 93 Chambers street and 71 Reade street, in the city of New York. It is also the owner of certain materials and machinery situated within the precincts of the state prison at Sing Sing, in the town of Ossining, county of Westchester, used for the manufacture of boots and shoes, by the labor of convicts in said prison, and such materials and machinery are there temporarily for that purpose. The assessors of the town of Ossining assessed this property as against one Thomas Hapgood, claiming that said Hapgood was the agent of said company, as follows :

"Hapgood, Thos., for property in his
possession as agent for the Bay State
Shoe and Leather Company, stock
and machinery, ... \$16,000."

After completing the assessment roll, notice was duly given of the time and place where appeals from assessments made would be heard. At the proper time and place the relator appeared, by attorney, and asked that the assessment against its property be stricken from the roll, on the ground that it was illegal and void. This application was denied. The relator then sued out a writ of certiorari to review the action of the assessors. To this writ return was made that the roll had been duly certified and delivered by the assessors to the supervisor. A supplemental writ was then obtained, directed to the supervisor, directing him to produce the record before the court. It was claimed that the relator's property could only be assessed

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under section 6 of the article of the revised statutes relating to "the place in which property is to be assessed," whereas the assessment had been made in accordance with the provisions of section 5 of that article.

Winfield, Leeds & Morse, for the relator.—I. The relator's property can only be assessed in the mode prescribed by the legislature, and in no other manner. (*Wilson v. Mayor, &c.*, 4 *E. D. Smith*, 675; S. C., 1 *Abb. Pr.* 4).

II. The property of a foreign corporation must be assessed in like manner as if it were a resident corporation (*Laws of 1855*, chap. 37, § 1; *British Com. Ins. Co. v. Commissioners, &c.*, 1 *Keyes*, 303; S. C., 1 *Abb. Ct. of App. Dec.* 199).

III. The relator is a foreign corporation, and its property must be assessed in like manner as if it were a resident or domestic corporation. The assessment is made in accordance with the provisions of section 5 of the article of the revised statutes relating to "the place in which property is to be assessed," viz., against the agent under whose control the property was, as claimed by defendants. The assessment, however, being against a corporation, could only be made in accordance with the provisions of section 6 of said article, viz., in the town or ward "where the principal office or place for transacting its financial concerns shall be" (1 *Rev. Stat.* [6th ed.] 935, as amended by *Laws of 1855*, chap. 37; *British Com. Ins. Co. v. Comm'rs, &c.*, 1 *Keyes*, 303; S. C., 1 *Abb. Ct. of App. Dec.* 199).

IV. Since the relator has "no principal office or place for transacting its financial concerns," in the town of Ossining, county of Westchester, the assessors had no power or authority under the statute to assess its property there, and such assessment is therefore wholly unauthorized, illegal and absolutely void.

People ex rel. Bay State Shoe and Leather Co. v. McLean.

V. Since the assessors had no power or jurisdiction to make the assessment against the relator, their action may be reviewed by this court, as the supreme authority, and the assessment roll may be corrected in the hands of the supervisors at any time before it has passed beyond their jurisdiction (*People v. Reddy*, 43 *Barb.* 539; *Starr v. Trustees of Rochester*, 6 *Wend.* 565; *Le Roy v. Mayor, &c.*, 20 *Johns.* 430; *Wilson v. Mayor, &c.*, 4 *E. D. Smith*, 675).

VI. Where the court is asked to affirm or reverse, modify or correct the assessment roll, which has been brought before the court, the judgment is rendered upon the record, and the court may order the officer in whose custody it is to correct it. Therefore, the answer of the assessors that the roll has passed out of their hands is insufficient (*People v. Reddy*, 43 *Barb.* 539).

Marcus L. Cobb, for defendants.

DYKMAN, J.—The relator is a foreign corporation, having a principal office and place for the transacting of the business and financial concerns of the company in the city of New York. It has certain machinery and personal property in the possession and under the control of an agent at the state prison, at the town of Ossining, used in the manufacture of boots and shoes, by convict labor, in the prison.

The assessors of the town of Ossining have assessed their property to the agent in their assessment roll for 1878, under the provision of section 5 of article 1, title 2, chapter 13, part 1, of the revised statutes (1 *R. S.* 6th ed. 934), which provides that every person shall be assessed in the town or ward where he resides when the assessment is made for all personal estate owned by him, including all personal estate in his possession or under his control as agent, trustee, &c. Section 6 of the same article provides that all the personal es-

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tate of every incorporated company liable to taxation on its capital, shall be assessed in the town or ward where the principal office or place for transacting the financial concerns of the company shall be. It is entirely clear that the last section must control in respect to the place where the personal property of every incorporated company must be assessed, and that the same cannot be assessed in any other place, even though found in the possession of an agent.

In the year 1855, a law was passed in this State providing that all persons and associations doing business in the State of New York as merchants, bankers, or otherwise, either as principals or partners, whether special or otherwise, and not residents of this State, shall be assessed and taxed on all sums invested in any manner in said business, the same as if they were residents of this State, &c. This law placed foreign corporations on the same footing with domestic, and subjected them to the same mode of taxation as if they were residents within the State (*British Comm. Life Ins. Co. v. Comm'rs*, 1 *Keyes*, 303; 1 *Abb. Ct. App. Dec.* 202).

There is no difficulty about striking this assessment from the roll, as that has been brought into this court by the supervisor in whose hands it now is (*People v. Reddy*, 43 *Barb.* 545).

An order must therefore be entered directing the supervisor to strike this assessment from the assessment roll of the town.

Naugatuck Cutlery Co. v. Rowe.

NAUGATUCK CUTLERY CO. v. ROWE.

N. Y. Supreme Court, First Department; Special Term, November, 1878.

MOTION FOR NEW TRIAL ON JUDGE'S MINUTES.—COSTS.—CODE OF CIV. PRO. § 999.

On motion for new trial made on the judge's minutes, under section 999 of the Code of Civil Procedure, without a case, costs as for a motion may be allowed by the judge granting or denying such motion, in his discretion; but the successful party is not entitled to a trial fee thereon, as for the trial of an issue of fact.

Appeal from taxation of costs.

On the rendering of the verdict, the defendants, Daniel C. Rowe, Sumner Babcock and William Post, moved for a new trial upon the judge's minutes, under section 999 of the Code of Civil Procedure. The motion was denied. Upon taxation of the plaintiff's costs the clerk allowed for "motion for new trial on minutes, \$30," and the defendant appealed.

Winfield, Leeds & Morse, for the defendants.—I. Plaintiff's right to recover costs depends wholly upon the statute, since no costs could be recovered at common law (*Supervisors of Onondaga v. Briggs*, 3 *Denio*, 173).

II. Costs must be recovered, if at all, under and by virtue of the statute in force at the time the verdict is rendered (*Jackett v. Judd*, 18 *How. Pr.* 385; *Supervisors of Onondaga v. Briggs*, 3 *Denio*, 173; *People v. Herkimer Com. Pl.*, 4 *Wend.* 210; *Scudder v. Gori*, 28 *How. Pr.* 155).

III. A motion for a new trial on the judge's minutes, under section 999, is not a trial within the meaning of section 252 of the old code, since that section has been repealed, and section 965, which has been substituted,

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does not give a specific definition of a trial. The case of *Muller v. Higgins*, therefore, which was decided on the theory that the motion was a trial within the meaning of the repealed section (§ 252), has no application under the Code of Civil Procedure.

IV. Under section 999, the application for a new trial on the judge's minutes is an ordinary motion, upon which an order may be entered, and an appeal taken, upon a "case," in the usual manner.

Wingate & Cullen, for plaintiffs,—Claimed the motion was a trial of an issue of fact, for which a trial fee of \$30 was allowed by section 307 of the Code of Procedure; and cited *Muller v. Higgins*, 13 *Abb. Pr. N. S.* 297; *S. C.*, 44 *How. Pr.* 224.

LAWRENCE, J.—It is not necessary on this motion to inquire whether the case of *Muller v. Higgins* (44 *How. Pr.* 224), was correctly decided. This motion must be disposed of under the provisions of the Code of Civil Procedure, the verdict having been rendered in October last. Section 999 of the present code treats the motion made upon a judge's minutes for a new trial, where no formal case has been prepared, simply as a motion; and it would seem to follow, that on the granting or the denial of such motion, only motion costs can be allowed. The granting of the costs on a motion is in the discretion of the judge before whom the cause was tried. The allowance of a trial fee by the clerk was therefore erroneous, and the fee must be stricken out. Leave, however, is granted to apply to the justice who tried the cause, for costs of motion.

People *ex rel.* Donovan v. Fire Commissioners of N. Y.

PEOPLE *ex rel.* DONOVAN v. FIRE COMMISSIONERS OF NEW YORK.

N. Y. Supreme Court, First Department; Special Term and Chambers, October, 1878.

CERTIORARI.—COSTS.—SPECIAL PROCEEDINGS.

Whether costs shall be allowed or not in special proceedings is subject to the discretion of the tribunal hearing and deciding the case. If they are granted they must be at the rate allowed for similar services in civil actions.

Hence, where, upon the return to a writ of *certiorari* to examine proceedings removing one from office, the matter was argued and a decision rendered reversing the proceedings with costs and disbursements,—*Held*, that the writ of *certiorari* must, for the purposes of costs, be regarded as the summons in a civil action, the return as constituting the answer and framing the issue upon which the case is heard and disposed of as an issue of law would be in a civil action, and therefore the relator was entitled to the same costs as for proceedings before and after notice of trial in civil actions, and to the same trial fee as for the trial of an issue of law.

Appeal from taxation of costs on a judgment in favor of the relator under a common law *certiorari*.

This was a common law writ of *certiorari*, requiring the Board of Fire Commissioners of the city of New York to return all the proceedings concerning the dismissal, discharge, and removal from office of James Donovan, the relator above named.

The matter was argued before Mr. Justice DONOHUE, and a decision rendered July 2, 1878, reversing said proceedings, with costs and disbursements.

Upon the taxation of costs, the relator sought to tax costs as of an issue of law, but the clerk only allowed \$10 costs of motion and disbursements.

From this adjustment the relator appealed.

Douglas A. Levien, Jr., for appellant.—The ques-

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tion of costs was in the discretion of the court before whom the cause was heard, and it was exercised by allowing them to the relator, who, being the prevailing party, was entitled thereto on a common law *certiorari* (People *ex rel.* Muller v. Commissioners of Schodack, 27 How. Pr. 158). A common law *certiorari* is a special proceeding, within the terms and intent of the code, and costs of appeal may be awarded thereon in the appellate tribunal (*Code*, § 318 ; *L.* 1854, p. 593, c. 270 ; People *ex rel.* Van Rensselaer v. Alstyne, 3 Abb. Ct. App. Dec. 575 ; reported below in 32 Barb. 131 ; People *ex rel.* Spencer v. Fuller, 40 How. Pr. 35 ; 5 Wait Pr. 483, and cases cited). Section 318 of Code changes the old rule.

William C. Whitney and *Thomas P. Wickes*, for respondent.—This is a common law *certiorari* (People v. Board of Police, 39 N. Y. 506, 512), and not, therefore, an action ; hence costs as in an action are not properly taxable. A legal issue only arises in an action, never in a special proceeding. The unquestioned practice in this department has been to allow \$10 costs of motion and disbursements. The decision in this matter is nothing more than that of a motion. After argument the motion was granted “with costs.” What costs ? The costs which are usual in similar cases (*L.* 1854, c. 270, § 3 ; People v. Fuller, 40 How. Pr. 35).

DANIELS, J.—Whether costs shall not be allowed in special proceedings has been rendered subject to the discretion of the tribunal hearing and deciding the case. And that is the entire extent of the discretion allowed to be exercised upon this subject, for wherever costs are allowed, then they must be at the rate allowed for similar services in civil actions (*Laws* of 1854, c. 270). The act assumes that there will be found sufficient similarity between the proceedings and the different steps ordinarily taken in civil actions to render

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the provisions made as to costs in the latter cases intelligently applicable to the proceedings in the former. That can only be done by assimilating them in substance, even though it cannot be done in name. That seems to have been the governing idea in the enactment of this law. And following that course the writ of *certiorari* issued in this case must, for the purposes of costs, be regarded as the summons in a civil action. It is the commencement of the proceeding. The return, when made, constitutes the answer and frames the issue, upon that the issue is heard, tried and disposed of as an issue of law would be in a civil action. That would entitle the relator to the same costs as are provided for proceedings before and after notice of trial in civil actions, and to the same fee for trial as has been fixed for the trial of an issue of law. The adjustment made in this case must accordingly be set aside, and a further adjustment directed in conformity with this construction of the law. No costs of this motion will be allowed to either party.

AMORÉ v. LA MOTHE.

N. Y. Superior Court; Special Term, September, 1878.

ATTORNEY AND CLIENT.—DEATH OF PLAINTIFF.—SUPPLEMENTARY PROCEEDINGS.

Upon the death of the plaintiff in the judgment, the attorney who recovered the same has no power, as such, to institute proceedings supplementary to execution. The death of the party ends the authority of the attorney. Proceedings thereafter must be taken in the name, and by the direction, of the personal representatives, or successors in interest of the deceased plaintiff.

Motion to set aside supplementary proceedings and a settlement made thereon.

Amoré v. La Mothe.

The action was brought by Lambert Amoré against Bernard J. La Mothe, and judgment was recovered in 1866, upon which execution was immediately issued, and no other execution was afterwards issued, nor was leave to issue one granted.

The plaintiff died about two years after the judgment was obtained, and no letters upon his estate were ever granted.

In June, 1878, the attorney of record for plaintiff obtained upon his affidavit, the usual order for examination of defendant as a judgment debtor in supplementary proceedings. Defendant called at the attorney's office before the return-day; sundry adjournments were had; and defendant finally gave him certain corporate stock as collateral security for the payment of an acceptance of said corporation, given by defendant in settlement of the judgment.

Defendant moved, upon an order to show cause, to have the supplementary proceedings set aside as null and void and to compel the attorney to restore and deliver up the stock and acceptance received by him in settlement thereunder. The latter filed an affidavit claiming to own one-half of the judgment and to represent the widow and child of the deceased plaintiff, and also produced on the argument a letter from the public administrator stating that said public administrator has applied for letters upon plaintiff's estate, and directing him to hold any property of the plaintiff in his possession. Further facts appear in the opinion.

Charles W. Dayton, for the motion.

Nathaniel Niles, opposed.

VAN VORST, J.—The objections on the part of the defendant to the proceedings taken under the judgment, which led to the settlement of which complaint is made, are substantial and valid.

The judgment was recovered in 1866, and an execu

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tion was at once issued thereon, and returned unsatisfied.

After the recovery of the judgment, and more than ten years ago, the plaintiff died.

The attorney who recovered the judgment made the affidavit upon which the order for the defendant's examination in proceedings supplementary to execution was obtained from one of the judges of this court.

In the affidavit he swears "that he is the attorney for the above plaintiff."

The death of the plaintiff is not suggested, yet his death revoked the authority of the attorney (*Putnam v. Van Buren*, 7 *How. Pr.* 31; *Billinger v. Ford*, 21 *Barb.* 311; *Austin v. Monroe*, 4 *Lans.* 67). Proceedings supplementary to execution are proceedings in the action (*Seeley v. Black*, 35 *How. Pr.* 369).

As long as the judgment remained unsatisfied the action was pending (*Wegman v. Childs*, 41 *N. Y.* 159).

After the plaintiff's death all proceedings in the action must be taken in the name of his representatives or successors in interest (*Code*, § 757).

At the time of the institution of the supplementary proceedings, no steps had been taken for the appointment of an administrator of the deceased creditor.

It follows that there was no person properly authorized to take the proceedings or make a settlement of the claim.

In answer to this objection the attorney claims to be "the one half owner of the judgment." When or in what manner he succeeded to such interest is not stated. But the proceeding was neither instituted nor settled upon the basis of an interest in any one, other than the plaintiff on the record, and the receipt given for the property received towards paying the judgment, is executed by him as "attorney for the plaintiff."

It must be held that the proceedings were unauthorized and void.

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The adjournments consented to by the defendant, who is a foreigner, and unacquainted with legal proceedings, can give no validity to the order, nor uphold the settlement. The settlement of the claim by a draft and stocks delivered to the attorney, under the circumstances disclosed, would afford no protection to the defendant, against the claims of those legally interested in the judgment, appearing by the record, and the proceedings thereon.

The proceedings and settlement are set aside, and the property should be redelivered to the defendant.

JURGENSON v. HAMILTON.

*New York Supreme Court, First Department ;
Special Term and Chambers, April, 1878.
Again, October, 1878.*

SUPPLEMENTARY PROCEEDINGS.

Proceedings supplementary to execution must be instituted in the county where the judgment debtor resides or has a place of business.

A second examination will not be allowed unless it is shown that the judgment debtor, since his former examination, has acquired property.

Motion to dismiss supplementary proceedings.

Christian Jurgenson recovered judgment against one Hamilton in 1874, shortly after examined him in supplementary proceedings, and having ascertained that he had no property, let the matter rest until April, 1878, when he procured another order from Judge POTTER to examine the defendant. On the return-day of the order the defendant appeared, and his counsel moved to dismiss the order, on the ground that the affidavit on which the order was obtained was not true in stating

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that the defendant resided and had a place of business in the county of New York, and denied this fact by affidavit, and stated that he resided in the county of Kings.

The proceedings were thereupon dismissed, for the following reasons, as stated by the justice before whom they were brought.

DONOHUE, J.—The defendant swears positively that he does not reside, nor have a place of business in this county, and the opposition swears on information and belief. The proceedings must be dismissed with costs.

After the above decision the plaintiff assigned the judgment to T. David G. R. Pelton, and on October 10, 1878, the assignee obtained an order that the defendant be examined concerning his property. Mr. Hamilton appeared, and his counsel again moved to dismiss the order, for the reason that the affidavit on which the order had been obtained did not state the fact that the judgment debtor had heretofore, in 1874, been examined in supplementary proceedings, nor show that the defendant had acquired property since his former examination.

George H. Kracht, for the motion.

Henry H. Morange, opposed.

BARRETT, J.—The defendant should not be harassed by successive examinations upon the same judgment. It is evident that he was fully examined, and if the proceedings were abandoned it was probably because the plaintiff has exhausted all remedies and reasonable efforts in that direction. It is only when proceedings have inadvertently fallen through, that a second order without freshly-acquired property, is allowed. A party cannot, after examining the matter for eight hours, drop the matter and commence *de novo*, when-

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ever it suits his convenience. The order must be dismissed with \$10.00 costs to be deducted from the judgment.

MATTER OF PAULMIER.

N. Y. Supreme Court, First Department ; Special Term and Chambers, September, 1878.

EXAMINATION OF AN EXPECTED PARTY TO AN ACTION, BEFORE ACTION BROUGHT.—CODE OF CIV. PRO. § 870.

The provision of section 870 of the Code of Civil Procedure,—that the deposition “of a person who expects to be a party to an action about to be brought,” may be taken at any time before trial,—is only for the examination of an expected party when he himself applies for it, and not for the examination of a party not yet sued, at the instance of another, who contemplates a suit against him.

The expression “adverse party,” in said section, is not applicable to an individual not yet a party to an action.

Motion to vacate an order for the examination of an expected party before action brought.

An order was obtained, upon the *ex parte* application of Andrew F. Paulmier, for the examination before a referee of John A. Sweeney and William H. Sweeney before suit brought.

The affidavit upon which the order was granted and which was made by the attorney in fact of the applicant, who was a resident of New Jersey, stated that said Paulmier intended to bring an action in the supreme court against said Sweeneys, who did business in New York city and resided in Brooklyn, and that neither of them had appeared in the action; that the said Paulmier was the owner of a certain railroad bond, which was described, and that it had been stolen from him by some unknown person on some day previous to a certain date, and had been traced into the possession of the said Sweeneys; that the said Paulmier claimed

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that they had obtained the same fraudulently from the thief or with notice that the same had been stolen ; and that they must account to him and pay him for the same ; that said Paulmier and the deponent, as his agent, were advised, and the deponent verily believed, that in order properly to frame the complaint in the said expected action it would be necessary to examine both of said Sweeneys, and that the testimony of each of them was material and necessary for the prosecution ; that both of said persons, who were expected to be the adverse parties in the said action, were each of full age and sojourning within this State, as deponent was informed and believed.

An order to show cause why the aforesaid order for the examination of the Sweeneys should not be vacated, was obtained upon the affidavit of one of them, corroborated by the other, alleging that the said attorney in fact of said Paulmier, had called upon them some time previously, and consulted with them with reference to the facts connected with aforesaid bond ; that on said consultation all the facts relating to their connection therewith were fully disclosed to him, and that nothing further or different could be disclosed by them ; that said attorney was in possession of all the facts in connection therewith known to them, and that the said examination would unnecessarily take them from their business ; that they were advised by their counsel that the affidavit of said attorney disclosed his possession of the knowledge of the facts necessary for the commencement of an action, if any existed, and that the said examination was merely inquisitorial ; that said Paulmier was a non-resident of this State, and had not filed security for costs ; that the deponents were advised by their counsel that they could be required to appear as witnesses as well after action commenced as before ; and therefore prayed that the order be vacated and said Paulmier remitted to his rights

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after action brought; that they were advised by their counsel that the affidavit upon which the order was granted did not conform to rule 89 of the general rules of practice, in that it did not specify the facts and circumstances which showed that their examination was material and necessary; that they denied the statements in said affidavit that they had obtained said bond fraudulently from the thief, or with notice that the same had been stolen; averred that they never had possession thereof as purchasers, but received it simply as brokers to be sold for the person who held it; that they never became possessed thereof as purchasers nor by a gift, nor did they sell the same, nor receive the proceeds thereof to their own use.

Then followed denials of the necessity of the examination in order to frame the complaint and the reasons for a return of the order to show cause before the regular motion-day.

Amos G. Hull, for the motion.—The proposed plaintiff being a non-resident, and this order being discretionary, it ought not to be granted in his favor without securing the rights of the resident. He should be required to commence his action before such an order is granted by the service of a summons, and then he can be required to give security. By the applicant's affidavit a complete cause of action appears if the alleged facts can be sustained, and if he wishes he can make the examination after the commencement of the action and before trial, or on the trial, but should not be allowed to go into an inquisitorial examination before action brought. The affidavit is defective in not specifying the facts and circumstances which show that it is necessary and material (Rule 89). If the Sweeneys obtained the bond fraudulently from the thief, or with notice that it had been stolen, it would subject them to a criminal prosecution, and they could

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not be compelled on the examination to testify against themselves (*Code of Civ. Pro.* § 837). It is not alleged in the affidavit that any counsel of this court has advised the applicant that it is necessary to make the examination in order properly to frame the complaint; nor are facts stated to authorize the proceeding under section 870 of the Code of Civil Procedure as amended by chapter 299 of the *Laws of 1878*. The provision for a deposition of a person who expects to be a party to an action is intended only to give relief to those who expect to be made parties to an action, and not for the benefit of those who intend making others adverse parties (*Glenney v. Stedwell*, 64 *N. Y.* 125). Neither can the proceeding be sustained under section 871 (*Id.*).

Elliot T. Shepard, opposed.

WESTBROOK, J.—An order was made to examine John A. Sweeney and William H. Sweeney, upon the application of Andrew F. Paulmier, he stating that he expected to bring an action against them, and that such an examination was necessary in order to frame a complaint in the action which he contemplated. The question which the motion presents is, does the section 870 of the code provide for such an examination?

As amended by chapter 299 of laws of 1878, the section (870) of the code to which reference has been made reads as follows: "The deposition of a party to an action pending in a court of record or of a person who expects to be a party to an action about to be brought in such a court other than a court specified in subdivision sixteenth, seventeenth, eighteenth or nineteenth of section two of this act may be taken at his own instance or at the instance of an adverse party or of a co-plaintiff or co-defendant at any time before the trial as prescribed in this article." It will be observed that provision is made to examine two classes of

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individuals, and no others. He who is ordered to be examined must be either "a party to an action," or "a person who expects to be a party to an action." If he belongs to either class, he may be so examined "at his own instance or at the instance of an adverse party or of a co-plaintiff or co-defendant." As no action is pending between these parties, the applicant for the order was required to prove that each of the individuals ordered to be examined was "a person who expects to be a party to an action." This was not attempted to be shown, but the allegation is that the applicant for the order expects to sue them. Giving, then, to the code the meaning claimed for it by the counsel who seeks to uphold the order, that provision has been made to examine a person whom some one expects to sue, and that such examination can be had at the instance of the intended prosecutor, the objection still remains that the section provides that if the individual to be examined is not "a party to an action" he must be "a person who expects to be a party to an action about to be brought," and that the affidavit upon which the order for the present examination was obtained makes no attempt to show, because it is nowhere therein alleged or claimed that the parties to be examined have any such expectation.

It is manifest, however, as an expectation entertained by an individual can only be proven by himself, that provision is only made for the examination of an expected party when he himself applies for it, and not for the examination of a party not yet sued, at the instance of another, who contemplates a suit against the former. Neither is the expression "adverse party," at whose instance the order for examination must be procured, when not obtained by one for the purpose of taking his own evidence, especially when it is followed by the words "co-plaintiff or co-defendant," which are clearly indicative of its meaning, applicable to an indi-

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vidual not yet "a party to an action." Possibly, depending upon its connection, it might sometimes have such a signification ; but in the section under consideration, as the word "party" is previously used to designate an individual already connected as such with a pending suit, whilst the one not so circumstanced is styled a "person," it is evident that it is used in its technical legal sense to designate him who is the "adverse party" to the "party in an action."

The views expressed, which are founded upon the words used, are strengthened by the absence of any language directly covering a case like the present, and also from the consequences flowing from a contrary construction. If provision was intended to be made for the examination of a person who some one else expected to sue, it was easy to say so clearly, by declaring that such examination could be had at the instance of an expected adverse party, as well as at the instance of one who already actually was "an adverse party." The addition of the simple words we have suggested, preceded by the conjunction *or*, would probably have accomplished the object, though it might be difficult for one man to prove that another expected to be prosecuted, which the language would still require, and the whole section would thereby be made awkward. The framer, it is to be presumed, understood this as well as the court. Had those words been added, or any clearly providing for an examination in a case like the present, he knew that individuals might be subjected to great annoyance and expense by examination at the instance of persons who really did not know whether they would bring a suit or not, or that the person sought to be examined expected one to be brought, but who would, nevertheless, so torture their desires and hopes, to find out the materials for an action by the examination, as to make a sworn declaration

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which would bring them within the provisions of the statute.

Such inquisitorial power we cannot think was intended to be conferred, and if it was, it should have been so clearly expressed and declared as to leave no room for criticism.

The motion to set aside the order of examination is granted, without costs, as the question is novel, and the court by granting the original order fell into the error now corrected.

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N. Y. Superior Court; General Term, May, 1878.

EXAMINATION OF PARTY BEFORE TRIAL.—REQUISITES OF AFFIDAVIT
TO OBTAIN ORDER FOR VACATING ORDER FOR.—CODE
OF CIV. PRO. §§ 870, 872, 873.

Upon the presentation to a judge of an affidavit complying in form with the requirements of section 872 of the Code of Civil Procedure, he must grant an order for the examination of a party before trial, but when the party to be examined comes into court, then the proceedings must be subject to judicial control, and he can vacate the order upon cause shown.*

* In *TURNER v. KINGHORN* (*N. Y. Marine Court; Chambers, October, 1878*) it was *held*, that where a party has waited until his case has been placed upon the day calendar for trial, the court must have satisfactory reasons explaining the cause of the delay, which must be stated in the affidavit; otherwise an order for an examination of a party, made returnable in less than five days, under section 873, will be vacated, on the ground that the party applying for the order has been guilty of laches.

Motion to vacate an order for the examination of the plaintiff before trial.

The cause was upon the day calendar for trial, and the parties had been for several days in attendance waiting for it to be reached in its order. Two days before the case was reached, on the 14th of October,

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Sections 370 to 386 of the Code of Civil Procedure constitute but a part of a system of practice furnished by, 1st, the Code of Civil Procedure; 2nd, the unrepealed portions of the Code of Procedure; 3rd, statutes not embraced in either; and 4th, the rules and practice of the courts preserved by section 469 of the Code of Procedure, so far as they are not inconsistent with later legislative enactments; and the whole must be considered and treated as one system intended to be consistent throughout.

Hence, if any section or part be intricate, obscure or doubtful, its true meaning should be discovered by comparing it with other sections or parts in the light of the general legislative intent, disclosed by the whole system with respect thereto.

the defendant prepared an affidavit, setting out the following facts therein, as a reason why the order should be made returnable in less than five days :

"That this action is upon the day calendar for to-morrow, October 15th, before Chief Justice ALKER, but deponent does not think it will be reached for trial until the 17th instant. . . . That deponent does not desire to delay the trial of said cause, but that said examination can be had, and said trial proceed when said cause is reached, as deponent verily believes. That for the reasons hereinbefore stated, deponent desires an order for said examination returnable to-morrow, October 15th, 1878, at 10, A. M."

Winfield, Leeds & Morse, for plaintiff.—I. The affidavit upon which the order for the plaintiff's examination was granted is not sufficient to warrant or sustain the order (*Beach v. The Mayor*, 4 *Abb. N. C.* 236).

II. The court will not encourage laches, and when the party has waited until the cause has been placed upon the day calendar for trial, and is about to be reached, the court must have satisfactory reasons explaining the delay, and these must be shown in the affidavit, and the fact recited in the order (*Code of Civil Procedure*, § 873).

III. The court will not establish a precedent allowing parties to be dragged off for examination when they are waiting for the cause to be called, and hourly expecting to go to trial, when the delay is inexcusable, and no special circumstances are shown justifying the postponement, as required by section 873.

Carpentier & Hays, for defendant, opposed.

MCADAM, J.—The papers comply with the substantial requirements of the statute, but the defendant's laches in delaying until the cause was on the day calendar before applying for the order, entitles the plaintiff to have it dismissed. Ordered accordingly. No costs.

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Not only has the inherent power of every court of record, unless expressly restrained by statute, to vacate, on motion, its process, order, or judgment, to prevent a perversion thereof, or to frustrate oppression, been unimpaired by the Code of Civil Procedure, but by section 772 such power has been confirmed in express terms.

If the affidavit on which an order for the examination of a party before trial has been obtained, is shown to be deficient in any necessary particular, the order may be vacated.

Also, if the allegations of the affidavit, though sufficient by themselves, are successfully met by opposing proof.

The rules laid down in *Winston v. English*, 44 *How. Pr.* 398; *aff'd in 14 Abb. Pr. N. S.* 119, may be safely followed.

Where the plaintiffs, before the defendants' time to answer or appear had expired, obtained an order for their examination upon the complaint, which alleged a good cause of action, and an accompanying affidavit which, though alleging various facts, that would have justified the order in case the defendants had interposed a general denial, did not claim that the plaintiffs desired to amend their pleading, nor that the examination sought was material and necessary to enable them to do so, but simply in the prosecution of the action; and the defendants showed by affidavit that prior to the commencement of the action, one of them had been examined at length in another action between the same parties in the supreme court, on presumably the same issues, and that said examination had been finished and closed,—*Held*, that the plaintiffs' affidavit was insufficient and the order should be vacated.

In such a case, a claim that if the defendants should fail to answer, the examination of some of the defendants would be necessary, to enable the plaintiffs to obtain judgment on application to the court, is of too speculative a character to sustain the order.

Appeal by defendants from an order denying a motion to vacate an order for the examination of several of the defendants after service of summons and complaint and before issue joined.

The action was by David Levy and others against Solomon Loeb and others.

The motion was founded on affidavit, and it was denied solely on the ground that the Code of Civil Procedure gives an absolute right to such examination, or

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in other words, that there is no power to vacate the order.

The other facts sufficiently appear in the opinion. Thereupon the defendant appealed.

William Man (*Man & Parsons*, attorneys), for appellants.

Lewis Sanders (*S. Kaufman*, attorney), for respondents.

BY THE COURT.—FREEDMAN, J.—Prior to the recent revision of the statutes, this court had steadily adhered to the view that the right of a party to an action to examine the adverse party did not, under the code as it then stood, arise after issue joined, but that it existed from the time of the commencement of the action (*McVickar v. Greenleaf*, 4 *Robt.* 657; *Fullerton v. Gaylord*, 7 *Id.* 551; *Duffy v. Lynch*, 36 *How. Pr.* 509); and that this right could not be abrogated by rule (*Glenney v. Stedwell and World Mut. Life Ins. Co.*, 40 *N. Y. Super. Ct.* [8 *J. & S.*] 92; 1 *Abb. N. C.* 327).

Other tribunals differed more or less with this court upon this question, but the court of appeals, on affirming the case last mentioned (64 *N. Y.* 120), settled the law in conformity with the views of this court.

At the same time, this court considered it but just, and even necessary for the protection of the party to be examined, that the papers supporting the application should fully establish, by facts and circumstances, the good faith of the application, and the materiality of the examination sought; and if they were deficient in that respect, the application was denied, or the order, if inadvertently granted, vacated pursuant to order to show cause. Thus, in *Winston v. English*, 35 *N. Y. Super. Ct.* (3 *J. & S.*) 512, an order made for the examination of the plaintiff before service of the complaint was set aside, because the examination could not, at that stage of the proceedings, be said to be nec-

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essary. It could not be said to be necessary to enable the defendant to prepare his answer, for until the complaint was served, he could not know what the alleged cause of action was, or would be, nor what he would have to answer, nor could it be seen that it was material in aid of a defense, until an issue had been framed.

After the complaint had been served, the defendant obtained a new order, but that was again vacated, on the ground that the defendant had not sufficiently shown the necessity of the examination, nor sufficiently satisfied the court of the good faith of his application.

The rule was stated as follows: "Whenever, therefore, a party applies, under section 391, after issue joined, for the examination of the adverse party as to matters within the issues, the application is usually granted as a matter of course, and of absolute right. In such case slight evidence is sufficient to satisfy the court as to the materiality of the discovery sought.

"But when the examination is sought at an earlier stage, where the danger of abuse is imminent, and the difficulty of restricting the examination within reasonable limits great, the court is bound to ascertain by evidence, not only that the examination is material, and how it is material, but also that it is made in good faith, and for a necessary and proper purpose.

"If all this is shown affirmatively, the examination is a matter of right, but otherwise not" (*Winston v. English*, 44 *How. Pr.* 398).

These views also found support in the court of appeals, for in delivering the unanimous opinion of that court in *Glenney v. Stedwell* (64 *N. Y.* 120), Mr. Justice FOLGER, after stating that the examination before trial is a substitute for the bill of discovery, says: "It is for the judges now, by rules of practice and by rulings at the examination, to keep the plaintiff (meaning party) within proper bounds, and to

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ward off from the defendant (meaning adverse party) all inquiry that is vain or curious."

In enacting the Code of Civil Procedure, the legislature attempted to provide by express provisions for the exercise of the right of examination. By section 870 the right is given at any time before trial, as prescribed in the article of which that section forms a part.

Section 872 prescribes the requisities of the affidavit to be presented by the party applying for the examination.

Section 873 provides that the judge to whom such an affidavit is presented, must grant an order for the examination at a time and place to be therein specified.

Section 876 provides that upon proof, by affidavit, that service of a copy of the order and of the affidavit has been duly made, as directed in the order, the judge or the referee must proceed to take the deposition of witness at the time and place specified in the order. He may, from time to time, adjourn the examination to another day, and to another place, within the same county.

By section 880 the judge or referee taking a deposition is required to insert therein every answer or declaration of the person examined, which either party requires to be inserted.

Under section 881 the deposition, or a certified copy thereof, may be read in evidence by either party, at the trial of, or upon the assessment of damages, by writ of inquiry, or upon a reference, or otherwise, in the action specified in the original affidavit, or any other action, thereafter brought, between the same parties, or between any parties claiming under them, or either of them, &c., &c.

Other provisions not necessary to be mentioned here regulate the service and the enforcement of the order, the manner in which the deposition is to be taken, completed, certified and filed, and its use and effect.

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Upon the provisions specially referred to, it has been contended that upon the mere presentation of an affidavit complying in form with the requirements of section 872, the right to the examination is absolute, if an action is pending; that in such case the judge to whom the affidavit is presented must grant the order; and that the order, when once made, cannot be vacated again for cause assigned by the party to be examined.

If this were so, the order for the examination would amount to a general, irrevocable, statutory search warrant, which can be demanded as matter of right.

I cannot subscribe to such a construction. True, section 873 makes it obligatory on the judge to grant the order upon the presentation of an affidavit complying in form with the requirements of section 872, and to this extent the new code makes an important innovation. But when the order has been made, and the party to be examined comes into court, then the proceeding must necessarily be subjected to judicial control. If it were otherwise, if neither the judge nor the court have power to vacate for cause shown,—if it were just as obligatory to take and complete the examination as it is to grant the order in the first instance, then a party may take out as many successive orders against his adversary as he chooses, and have each time the same examination taken, certified, and filed, to the great oppression of his adversary; or a plaintiff in an action in which there are fifty defendants, may be examined as to the same matters by each of the fifty defendants.

For the same reason it would follow that the examination can be compelled in an action for divorce on the ground of adultery, for the purpose of extorting a confession, and that, in all actions in which the defendant has so far been privileged from answering, his conscience may now be scraped until he does criminate himself; for the section which prescribes the requisites

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of the affidavit makes no distinction in terms as to the class of actions to which the right of examination is to be confined, nor does the article containing the provisions under examination provide at what stage of the proceedings or in what manner a witness may assert the privilege accorded to him by other statutes. On the contrary, section 880, as already stated, provides that the judge taking the deposition must insert therein every answer or declaration of the person examined, which either party requires to be inserted.

It cannot be assumed, therefore, that the revisers intended to work the deplorable results which would flow from this helpless condition of the tribunals charged with the administration of justice. There is nothing in their notes showing any such intent. Their intention seems to have been to consolidate the provisions of law relating to the examination of a party by an adverse party; the taking of depositions conditionally; the perpetuation of testimony, and the taking of depositions by consent; and in carrying out this intention, their principal aim seems to have been to provide one mode of taking depositions in all these cases and to remove unnecessary differences.

True, the power to vacate is not to be found among the provisions relating to these depositions. But the same objection might have been made to the provisions of the old code by which the right of examination was conferred, and yet the power existed and its existence was never questioned.

Sections 877 and 878 of the Code of Remedial Justice, which preceded the New York Code of Civil Procedure for a short period, did provide for an application by any party to vacate the order, but on certain specified grounds only. In the discussions, however, to which said code gave rise, these grounds were deemed too narrow to allow an equitable discretion to be exercised, and hence, by the amendments of 1877,

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these restraints on the power of the court to vacate were abolished by the repeal of the said two sections.

The truth is that sections 870 to 886 of the Code of Civil Procedure constitute but a small part of a system of practice furnished by

1. The Code of Civil Procedure.
2. The unrepealed portions of the old code.
3. Statutes not embraced in either ; and,
4. The rules and practice of the courts preserved by section 469 of the old code, so far as they are not inconsistent with later legislative enactments.

This system of practice must be considered and treated as one intended to be consistent throughout, and hence, if any section or part be intricate, obscure or doubtful, the proper mode of discovering its true meaning is by comparing it with the other sections or parts in the light of the general legislative intent disclosed by the whole system with respect to the intricate, obscure or doubtful point. "Where there is clear and unambiguous evidence," says Mr. Justice COLERIDGE, "that to withdraw a case from the operation of a section, is to fulfill the general intent of a statute, and also, that to adhere to the literal interpretation is to decide inconsistently with other and overruling provisions of the same statute, the court may properly act upon it, for the object of all rules of construction is to ascertain the meaning of the language used, and it would be unreasonable to impute to the legislature inconsistent intents upon the same general subject matter. What it has clearly said in one part, must be the best evidence of what it has intended to say in the other. The court must apply in such a case the same rules which it would use in construing the limitation of a deed ; it must look to the whole context and endeavor to give effect to all the provisions—enlarging or restraining, if need be, for that purpose, the literal interpretation of any particular part."

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So it was held, that when the meaning of any particular section or clause in the constitution is questioned, it is proper to look into other parts of the constitution; otherwise the different sections might be so construed as to be repugnant to each other, and the intention of the makers might be defeated; and if, upon the examination of the general meaning and objects of the constitution, it should be found inconsistent with the literal import of any particular clause or section, such clause or section must, if possible, be construed according to the spirit of the act (6 *Cranch*, 307).

When, therefore, every part of this vast system of practice is brought into action, in order to collect from the whole the consistent sense of the particular sections now under examination, it will appear not only that the power which inheres in every court of record, unless restrained by positive enactment, to vacate on motion its process, order or judgment, to prevent a perversion thereof, or to frustrate oppression (*Morgan v. Holladay*, 38 *N. Y. Superior Ct. R.* [6 *J. & S.*] 117), has not been impaired by the Code of Civil Procedure; but also, that section 772, which forms part of a title treating of motions and orders generally, and making general provisions for the same, confers the power to vacate an order in express terms. Under that section, an order in an action made without notice, which grants a provisional remedy, can be vacated only in the mode specially prescribed by law, and *in any other case* it may be vacated or modified, without notice, by the judge who made it, or, upon notice, by him or by the court. The examination of a party before trial, not being a provisional remedy within the meaning of that term as used in said section, the words "in any other case," which are used without any qualification whatever, clearly embrace an order made for such examination. Sections 873 and 876 must, therefore, be con-

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strued in connection with the general grant of power conferred by section 772 in confirmation of the power inherently possessed by the court, and in the light of the former practice of the courts; and when thus construed, all doubts as to the existence of the power to vacate must vanish. The examination must proceed, if no motion be made to vacate the order, or the motion to vacate be denied. But the direction to proceed is not inconsistent with the exercise, for cause shown, of the power to vacate. This fully coincides with the general policy of the legislature upon the subject of these examinations, for while, as shown in *Winston v. English*, 44 *How. Pr.* 398, the legislature, representing the progressive power of the State, from time to time extended the right of discovery to new classes of cases and provided new remedies for securing it, it constantly looked to the courts as the representative power of the conservative element, for the prevention of the abuse of the letter of the law in individual cases.

The question then remains as to when and in what cases, and under what circumstances, the power to vacate is to be exercised. Section 872 applies to all depositions which may be taken under the title, of which it forms a part, whether of parties or witnesses, and it prescribes, generally, the requisites of the affidavit to be presented by the party desiring to take a deposition. In addition, the effect of rule 89 of the general rules of practice, enacted pursuant to the authority conferred by section 17 of the Code of Civil Procedure, is that the affidavit must in all cases specify the facts and circumstances which show the materiality and necessity of the examination.

If, therefore, the affidavit on which an order has been obtained, is shown to be deficient in any necessary particular, the order may be vacated. The same result may take place if the allegations of the affidavit,

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though sufficient by themselves, are successfully met by opposing proof. No precise rule can be laid down for all cases likely to arise. Each application to vacate must be determined upon the facts as they are made to appear. But so far as rules can be stated, the rules laid down in the cases of *Winston v. English*, above referred to, may still be followed with safety.

The case at bar affords a striking illustration of the necessity of the exercise of the power. The plaintiffs, before the defendant's time to answer or appear had expired, obtained, upon their complaint and an affidavit, an order for the examination of two of the defendants. The complaint alleged a good cause of action with sufficient certainty, and the affidavit accompanying it, though alleging various facts which perhaps would have justified the order in case the defendants had interposed a general denial, did not claim that the plaintiffs desired to amend their pleading, and that the examination sought was material and necessary to enable them to do so, but simply claimed that it was material and necessary for the plaintiffs in the prosecution of the action. But it is difficult to perceive how, at that stage of the case, it could be in fact material and necessary for the purpose alleged. No issue had been joined, and as long as it could not be seen what the issue would be, it could not be determined what the prosecution of the action required. Nor did the plaintiffs disclose any reasons showing a special requirement. The defendants summoned showed, on the other hand, by affidavit, that some time prior to the commencement of this action, the defendants had brought an action in the supreme court against the present plaintiffs; that in that action the present plaintiffs had set up, by answer, the cause of action now sued upon, and had procured an order for the examination of the defendants, and had actually examined one of them, at considerable length, on pre-

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sumably the same issues as will arise in the present case, and that said examination had been finished and closed. This proof rendered it all the more necessary that the plaintiffs should show, affirmatively, some clear and valid reason for proceeding with the examination in this action, but they failed to give any. The claim to which they finally resorted, that if the defendants should fail to answer, the examination of some of them would be necessary to enable the plaintiffs to obtain judgment on application to the court, is of too speculative a character.

The order appealed from should be reversed with costs, and defendant's motion to vacate the order for examination granted.

SPEIR, J., concurred.

CORBETT v. DE COMEAU.

[Reversing 4 Abb. N. C. 252.]

N. Y. Superior Court; General Term, May, 1878.

EXAMINATION OF PARTY BEFORE TRIAL.—REQUISITES OF AFFIDAVIT TO OBTAIN ORDER FOR.—PRIVILEGED COMMUNICATIONS.—

CODE OF CIVIL PROCEDURE, §§ 870, 872, 873.

The court has power to vacate an order for the examination of an adverse party before trial.

Where, upon the return-day of an order for the examination of the defendant after the service of the summons, but before service of the complaint, the defendant objected to be sworn, and moved that the order be vacated, on the ground that he could not be compelled to criminate himself,—*Held*, that the burden of proof was on the plaintiff to show that there were material matters as to which he could be examined, and upon his failure to do so, the order might be vacated before the defendant was sworn, as it would be an idle ceremony.

Where the affidavit upon which such an order was granted, showed that the sole object of the examination was to prove by the oath of

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the adverse party the publication of a letter, libelous on its face, in a newspaper, and did not show that it was material and necessary to enable the plaintiff to frame his complaint, nor that the publication could be proved by other testimony, if necessary,—*Held*, that the mere general averment of the affidavit that the testimony of the defendant was material and necessary to the plaintiff in the prosecution of the action, was insufficient.

Appeal by defendant from order denying his motion to vacate an order for his examination as an adverse party before trial.

This was an action by John J. Corbett against Louis De Comeau for libel. After service of the summons, but before service of the complaint, the plaintiff obtained an order for defendant's examination. Upon the return-day the defendant objected to being sworn, and moved for the vacation of the order, on the ground, among others, that the action being for libel, he could not be compelled to prove against himself the publication of the alleged libel.

This motion having been denied (see 4 *Abb. New Cas.* 252) he appealed.

Coudert Brothers, for appellant.

W. F. Severance, for respondent.

BY THE COURT.—FREEDMAN, J.—The existence of the power to vacate an order made for the examination of a party at the instance of the adverse party, has been so fully shown in *Levy v. Loeb*,* decided at the present term of this court, that no further discussion upon that point is necessary here. In so far, therefore, as the denial of the motion was based upon a supposed want of power, it rests upon an erroneous view of the law.

[The learned judge here stated the facts.]

The rule that a witness cannot be compelled to dis-

* *Ante*, p. 157.

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close any matter which may subject him to a penalty, a forfeiture, or a criminal proceeding, nor to disclose any matter constituting a link in the chain of evidence which may subject him to any of these consequences, has not been repealed by the Code of Civil Procedure, but is expressly retained by section 837. But it is the personal privilege of the witness, and ordinarily it can only be urged when a question having that tendency is addressed to him. As a general rule, therefore, the premature assertion of the privilege affords no justification for refusing to be sworn.

On the other hand, it was incumbent on the plaintiff to demonstrate by facts and circumstances the materiality, necessity, and good faith of the proposed examination at the particular stage of the case at which it was sought to be taken. When, therefore, the defendant claimed his privilege, the plaintiff should at least have shown that there were material matters as to which the defendant could be examined. The burden of proof upon this point rested upon the plaintiff from the start; especially as under the former practice, as was also insisted upon by the defendant, no bill of discovery would have been sustained for the purpose sought to be accomplished by the examination (*Leggett v. Postley*, 2 *Paige*, 599; *Marsh v. Davison*, 9 *Id.* 580; *Bailey v. Dean*, 5 *Barb.* 297; *Lansing v. Pine*, 4 *Paige*, 639; *Taylor v. Bruen*, 2 *Barb. Ch.* 301; *McIntyre v. Mancius*, 16 *Johns.* 592); and no examination was allowed to proceed where it was evident that the witness could not be compelled to answer a single material question under it.

But the affidavit on which the order was granted, showed that the sole object of defendant's examination was to prove, by the latter's own oath, the publication of a letter, libelous on its face, in a newspaper, with the design to injure the plaintiff, and no further proof was adduced to overcome defendant's objection. Moreover,

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there was no pretense that the examination was material and necessary to enable the plaintiff to frame his complaint, or that the publication could not be proved by other testimony, if such proof should become necessary at a subsequent stage. The mere general averment of the affidavit, "that the testimony of the defendant is material and necessary to plaintiff in the prosecution of this action," did not meet the requirements of rule 89.

For these defects, and it plainly appearing from the whole case, that the object of the plaintiff was not so much to collect proof in aid of an action which he had, as to find out, by the examination of the defendant, whether he had any against the latter in particular, the motion to vacate should have been granted. To have compelled the defendant to take the oath, and then to reassert his privilege, would in this case have been an idle ceremony.

The order appealed from should be reversed with costs, and defendant's motion to vacate the order for examination granted.

SPEIR, J., concurred.

MYER v. WHITAKER.

N. Y. Supreme Court, Third Department, Third District; Special Term, January, 1878.

RIPARIAN RIGHTS.—WATERCOURSES.—PONDS.—TAKING ICE.—
DEED OF RIGHT TO FLOW LANDS.

One who owns the land under a pond, or who has acquired the exclusive right to flow the land of another by a dam, has also the right to ice which forms in the water, subject to his duty not to alter the flow of the stream therefrom, so as to interfere with the beneficial employment of the owners below.*

* Upon the same principle, the right to use a pond as a millpond in

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Although such owner is not exclusive owner of all the water, he has a right not only to use the momentum of it as it flows, but to remove water or ice for consumption or for sale, provided the usefulness of the stream below is not impaired.*

This right to the ice to form on a given area may be assigned.†

cludes the right to float logs in the pond, even as against the owner of the fee of the land. *Beals v. Stewart*, 6 *Lans.* 408. And see *Town of Pierpont v. Lovelass*, 4 *Hun.* 696; *Partridge v. Eaton*, 63 *N. Y.* 482, aff'g 5 *Sup'm Ct. (T. & C.)* 625; *S. C.*, less fully, 3 *Hun.* 533.

The usual rights of riparian owners ordinarily attach to artificial ponds as well as to running streams. *Finley v. Hershey*, 41 *Iowa*, 389.

What constitutes a watercourse, within the rule as to the rights of owners below,—compare *Macomber v. Godfrey*, 108 *Mass.* 219; *Swett v. Cutts*, 50 *N. H.* 437; *Conhocton, &c. R. R. Co. v. Buffalo, &c. R. R. Co.*, 3 *Hun.* 523; *S. C.*, 5 *Sup'm Ct. (T. & C.)* 651; *Wagner v. Long Island R. R. Co.*, 2 *Hun.* 633; *S. C.*, 5 *Sup'm Ct. (T. & C.)* 163; *Barnes v. Salron*, 10 *Nev.* 217; *Eulrich v. Richter*, 37 *Wisc.* 226; *Ogburn v. Connor*, 46 *Cal.* 346.

As to what is a reasonable use,—see *Barnes v. Salron*, 10 *Nev.* 217; *Dumont v. Kellogg*, 29 *Mich.* 420; *Hinckley v. Nickerson*, 117 *Mass.* 213; *Holden v. Lake Co.*, 53 *N. H.* 552.

An alteration increasing the flow may be unlawful, as well as one diminishing it. *Mayor, &c. of Baltimore v. Appold*, 42 *Md.* 442. Compare *Treat v. Bates*, 27 *Mich.* 390.

* The right to the water, held not a title to it, but only a right to use it while passing. *Agawam Canal Co. v. Edwards*, 36 *Conn.* 476, 497.

According to some authorities, water, for a natural want,—such as thirst,—may be used without respect to deprivation of those below; but for irrigation or other artificial uses cannot. *Union Mill, &c. Co. v. Ferris*, 2 *Sawyer*, 176.

As to taking water for irrigation,—see *Hinckley v. Nickerson*, 117 *Mass.* 213; *Union Mill Co. v. Ferris*, 2 *Sawyer*, 176; *Fleming v. Davis*, 37 *Tex.* 173.

As to waters of a spring for household supply, and interferences therewith,—see *Hanson v. McCue*, 42 *Cal.* 303; *Waffle v. Porter*, 61 *Barb.* 180.

After a taking of land, by the city, for the purpose of conveying water into the city, for its use, the owner retains the right to make any use not interfering with that purpose. *Kane v. Baltimore*, 15 *Md.* 240.

† The right is an easement which cannot be created or released with-

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A grant by the owner of land, of the right to overflow his land by means of a dam on the stream below, gives the grantee the exclusive right to gather there the ice which may form over such land, on waters of the pond thus made.*

Trial by the court.

This action was by Amanda M. Myer against E. G. Whitaker and J. Finger for the recovery of the value of certain ice taken from a pond caused by a dam across the Esopus creek, in the town of Saugerties, Ulster county, and was before the court for trial by the court without a jury. The following facts were established:

The Esopus creek is a natural running stream of water emptying into the Hudson river at Saugerties aforesaid. About the year 1826 or 1827 a dam twenty-eight feet in height was built across it, and has ever since been maintained, which ponds and flows back the waters of the stream.

One Joseph B. Sheffield, at the time of the occurrence of the events out of which this suit originated, was and is now the owner of the land upon which the dam rests, and also was the owner of all the land covered by the waters of the pond, except a small part thereof, which belonged to the Overbagh family. That family, however, by deed dated April 24, 1841, for the consideration of \$5,750, had conveyed to the grantor of

out writing. *Brown v. Woodworth*, 5 *Barb.* 550; *Mumford v. Whitney*, 15 *Wend.* 380; *Babcock v. Utter*, 1 *Abb. Ct. App. Dec.* 27; *Arnold v. Hudson River R. R. Co.*, 55 *N. Y.* 661; rev'g 49 *Barb.* 108.

As to whether the ice is parcel of the land within the statute of frauds,—compare *Bank of Lansingburgh v. Crary*, 1 *Barb.* 542; *Webster v. Zielly*, 52 *Id.* 482; *McGregor v. Brown*, 10 *N. Y.* 114.

* As to the rights of the parties and their grantees, under a contract apportioning the surface of the pond among them,—see *Hittinger v. Eames*, 121 *Mass.* 539.

For recent cases on how the boundaries of adjoining owners are to be determined in respect to water surfaces,—see *Thornton v. Grant*, 10 *R. I.* 477; *Braxon v. Bressler*, 64 *Ill.* 488; *Kingsland v. Chittenden*, 61 *N. Y.* 618; 6 *Lans.* 15; *Wheeler v. Spinola*, 54 *N. Y.* 377.

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Sheffield "the right, privilege and liberty, to overflow so much of the said lands, falls and water privileges above mentioned as are now, or at any time hereafter may be, overflowed by means of the said dam across the Esopus in the year above mentioned, or by any other dam which may be erected in place of said dam."

The recitals in the deed show that the dam was erected during the years 1826 and 1827, and the waters by means thereof had overflowed the lands of the grantors, and rendered valueless to them certain falls in the stream.

In February, 1876, the firm of Myer & Rosepaugh, of which the plaintiff is the survivor, purchased all the ice in the pond, formed and to be formed—there being some reservations which are not material to be stated—from Joseph B. Sheffield.

Previous to the gathering of the ice from the pond, a freshet occurred in the Esopus creek which carried out of the pond a large part of the ice formed therein, and loosened that which was in controversy in this action from the shore, and would, probably, have swept this out also, had not the plaintiffs, by holes cut therein, fastened it to the shore and thus detained it.

Ice, during the winter of 1876, was comparatively scarce and valuable. The plaintiffs had a contract for all the ice in the pond at \$1.75 per ton stacked, and the cost of stacking and cutting was about half that sum, leaving a profit of eighty-seven and a half cents per ton.

After the plaintiffs had commenced to remove and gather the ice, the defendants went to the part of the pond over the Overbagh lands, by permission from such family, and cut a large quantity of ice thereon against the forbidding of the plaintiffs, and in spite of such forbidding opened a canal or channel across the pond, and over that part of it which was upon the land to which Sheffield had title, and floated the ice so cut by

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them through such canal or channel, and gathered and sold the same in the New York market. For the value of the ice so taken by the defendants, a recovery was sought in this action.

Peter Cantine, for the plaintiff.

Theodore B. Gates, for the defendants.

WESTBROOK, J.—As the firm of Myer & Rosepaugh, of which plaintiff is the survivor, claims under a purchase from Joseph B. Sheffield, the first question which this case presents is: What right of property, if any, did Sheffield have in the ice cut and removed by the defendants?

The water from which the ice was formed was ponded and gathered by him for his own use. He owned the dam that ponded and held them, which was located upon his own property. All the land under the water of the pond was his, except a small part thereof owned by Overbagh family, and upon and over that part of the land he held, by purchase, as the owner thereof, the right to flood and to hold the water. In a basin then, formed mostly out of his own land and in part out of the land of another, the right to use which for that purpose had been purchased for a valuable consideration from the owner, Mr. Sheffield had gathered a large body of water for his own use and benefit.

The manner of its use and the mode of its application to his own use, was not restricted by any deed, conveyance or title which he held, nor by any rule of law except the general one, that the flow of a natural stream shall not be so obstructed as to deprive owners below of the beneficial use and enjoyment of the stream and its flow. So long as such owners below were not interfered with, Mr. Sheffield, as the former and owner of the basin which held the water, had the right to use such water for his own profit; he could use its momen-

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tum to propel machinery, and let that right to others ; he could use the water for domestic and farming purposes, and could let and rent that right to others.

All these consequences follow, it seems to me, from his act of appropriation and gathering them. The land, basin, or vessel which held them, was his as owner in fee or as owner for use. By his dam he had filled that basin or vessel, and the water thus gathered or held therein was his, subject only to the exception that the beneficial enjoyment of owners below should not be interfered with, just as much as if he had gathered them for his own use and benefit into a tank or cistern which had been constructed for that purpose. The right to use and to sell the water in its liquid form is only a part of his right. When the form of the water changed by cold into ice, Mr. Sheffield had, it seems to me, the right to use it in its congealed form, and the same right to sell it and permit it to be gathered before it returned to its liquid state, as he had to use and dispose of when in the latter condition. There can be no difference as to his rights growing out of the state of the water.

All this appears so elementary and clear, and so plainly deducible from principles long established, as to be scarcely worthy of argument, were it not for the case of *Marshall v. Peters* (12 *How. Pr.* 218), upon which the defendants rely. In that case, which was very similar to this, a judge (EMOTT) for whose learning and integrity I have a profound respect, held that the party purchasing ice from the owner of a pond could not have an injunction against a trespasser who undertook to remove it. If the refusal to allow the injunction to continue had been put upon the ground that the plaintiff had an adequate remedy at law, and the insignificant value of the ice in controversy, the decision would not apply to the case before us.

The learned judge, however, goes further, and states

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principles and reasons for his conclusions, which, if they are sound, control this cause. Examination and reflection compel me to dissent from the opinion rendered in the case cited, and the reasons therefor will now be stated.

The judge (pp. 222, 223) says: "But it is quite as far from being true, that Mr. Lent is the owner of the water in this pond, or that it, or the ice formed from it, is his absolute property. The water in a running stream can never become, in any such sense as was claimed on the argument, the property of a riparian proprietor, even if he owns both banks, and the stream passes through his lands. All the property that a man can acquire in flowing water is a right to its use. He may have a certain right of property in it, but the water itself is not property. He has a right to its natural flow, and to use it for his cattle or his household, or upon his mill-wheels. But he cannot stop its current nor divert its flow, nor increase or diminish it, in any appreciable quantity. . . . He must allow the waters to pass out of his hands as they enter them, and his only right is a right to use them as they flow."

The error, with deference it is said, which the learned judge makes, is the over-statement of a general proposition and the want of a proper application of certain qualifications, the existence of which he recognized, to the general rule which he asserts, and upon which his decision is founded. It may be true, as he says, that the possessor of the mill-pond is not the "owner of the water," and that the same is not "his absolute property," provided, the judge means, that the owner of the pond does not own absolutely and exclusively all the water therein. This of course must be true, for if it were not, the riparian owner above could use the entire water of the stream, and thus prevent its natural flow and beneficial enjoyment by the owners below.

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It is also, however, true,—and this the judge admits when he says “he may use it for his cattle, or his household, or upon his mill-wheels,” though he fails to give it weight,—that the owner has the absolute property in the use of the water as it flows, not only in the application of its momentum, but also in its removal from the stream for consumption, provided the usefulness of the stream to the owners below is not impaired.

And it follows from this concession, because it is one of the rights of absolute property, that if such ownership as has been described is in one man, that he may convey the right he thus owns to another, the buyer taking it with the same limitations, that the title which he acquires to the water—liquid or solid—is subordinate to the rights of owners below, which must not be interfered with. To this extent, then, there is absolute ownership in water,—or its use, if that expression be preferred,—which the learned judge concedes.

Having made this concession, it seems to me, that his statement that there can be no “absolute property in the water of a pond, or the ice formed from it,” is too broad if applied to all the water, and is not limited in meaning, as the judge, in his general argument, seems to admit. It is too broad, because the right to use the water for domestic purposes, or to sell it for his own profit, and take it from the pond, and from the general flow for these purposes, subject only to the exception in favor of owners below, before stated, being conceded, it follows that the owner has some absolute property in the water—in its normal state or when frozen—which he needs, and which is capable of being enforced against one, who, without right, deprives the owner of its use or of his gains from a sale. If, as against such owner and his needs, the stranger can take some, he may take all, and the ponder of the

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waters would have no rights which the law can protect. If the judge had borne more clearly in mind the extent of absolute property in water which may exist, and of his concessions, he could not have held that the congealed water which the owner needed for his own profit, and which did not interfere with the natural flow of the stream, nor with the beneficial enjoyment thereof by riparian proprietors below, could be removed by a mere naked wrongdoer at pleasure. This conclusion I regard as unsound, and is entirely at war with other adjudications and principles which will now be referred to.

In *Mill River Woolen Manufacturing Company v. Smith* (34 *Conn.* 462), it was held, "That owners of the water of a mill-pond *own the ice formed upon it*, and the riparian proprietors have no right as owners of the soil to remove it."

In *State v. Pottmeyer* (33 *Ind.* 402; also reported in 5 *Am. R.* 224), it was held, "When the water of a flowing stream running in its natural channel, is congealed, the ice attached to the soil constitutes a part of the land, and belongs to the owner of the bed of the stream, and he has the right to prevent its removal." This case is worthy of attention, because it was most carefully considered and elaborately discussed. It had been to the supreme court of Indiana once before upon the quashing of the indictment. The court then held the indictment good, because the ice might have been taken from a pool upon the land of the owner, and therefore refused to consider or decide whether there could be property in ice formed in a running and unnavigable stream.

Upon the trial of the indictment, the court below held there could be no property in ice formed in a running stream. The court above held the contrary, and reversed its judgment (See an article upon this case in 3 *Albany Law Journal*, 386).

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In *Elliot v. Fitchburg R. R. Co.* (10 *Cushing*, 191), in *Brown v. Bowen* (30 *N. Y.* 519), and in many other cases, it has been held that the ponder of waters has a right to make any use thereof which is not inconsistent with the rights of owners below. The effect of this doctrine, which is identical with that stated in the beginning of this opinion, is that this right of use,—which may be to propel machinery, for domestic purposes, for sale and for hire,—is property, of which the owner can not be deprived by a mere wrongdoer. If owners below are interfered with, they will be protected against the improper or wasteful use of the water by the owner above; but as against all others who are strangers to those rights, the owner of the pond will be protected in the enjoyment of the use of the water, whether it be carried to his mill to propel his machinery, to his house or barn for consumption, or to the property of others to whom he sells or lets it for like use, and this right of use of the water is without regard to its state or condition. It might as well be said that its use is confined to the frozen state entirely, as to say it is confined to the liquid solely. This principle, so long and well settled, must control this cause.

The only seeming difficulty which this case has presented to my mind, grows out of the fact that the ice in controversy was taken from that part of the pond which was above the lands of the Overbagh property, the owners of which gave permission to the defendants to do the acts complained of. Reflection, however, satisfies me that this fact can not prevent a recovery, because,

First. The defendants not only removed ice from that part of the pond which was upon the Overbagh land, but against the forbidding of the plaintiff they cut a channel across the entire pond, thus removing and destroying ice which was formed in that part of

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the pond which was upon the Sheffield property, and for the ice thus destroyed at least there must be a recovery.

Second. By the conveyance of the Overbagh family, the right to flow back the waters, and hold them in the pond for the benefit and use of the owner thereof is transferred, and that right Mr. Sheffield now has. There was no limitation whatever upon the use to which the pond could put the waters, nor any reservation whatever to the Overbagh family in the water. In short, the effect of the Overbagh deed was to enable the owner of the right, by a dam, to make a large basin to hold water for his own use and purposes. Whatever rights, if any, which the Overbagh family had, or retained in the water, were subordinate to those of the owner of the right to pond. Being subordinate to those rights, the owner of the pond having need of so much thereof as was frozen, and such use being consistent with his ownership, as we have endeavored to show, no act or consent given by any of the Overbagh family could deprive the owner of the ponded water of the use to which he had applied it. This very principle is decided in *Mill River Woolen Manufacturing Co. v. Smith* (34 Conn. 462), before cited, in which it was held that the owner of the pond, as against the owner of the land, could prevent the removal of the ice. If it can be done because the owner needs the water in its liquid form, it can be done when the owner requires and needs it in its congealed form. The right to pond being for an unspecified purpose, its right of use and its manner of use depend upon the needs of the owner, to which all other rights are subordinate.

The cause has thus far been considered upon the abstract right of the plaintiff, obtained by the purchase from Sheffield, and our conclusion is that the action can be maintained upon that ground alone. There is, however, another view which is worthy of attention.

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After the purchase, Myer & Rosepaugh, who were the original plaintiffs, and to all their rights the present plaintiff, as survivor succeeds, by their own exertions in a freshet had saved the ice in controversy from being lost. By anchoring it to the shore and by labor performed thereon, they were in actual possession when the defendants took and converted it. If, with the consent of Mr. Sheffield, the plaintiffs had taken from the pond a quantity of its water, and being in actual possession, the defendants had deprived them of it, could the plaintiffs have recovered? And when a part of the water has assumed the form of ice, and is thus separable from the rest of the water, and in that form capable of being possessed and held,—is in fact thus held and possessed and retained in position for removal,—can such possession be taken from them and they be remediless? That which was thus possessed by them and taken from them by others was valuable, and can be recovered for, though it still lay in the pond where they had secured it for removal and stacking, though it had not yet been actually removed or stacked. All the possession which could be taken had been taken, and what had been was so marked and visible, and exercised over and towards property capable of actual possession, that in such possession the plaintiffs should be protected.

The conclusion is that the plaintiff is entitled to judgment. The plaintiff's attorney will prepare findings, which will be settled on notice.

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N. Y. Common Pleas ; General Term, February, 1877.
Again, Court of Appeals ; February, 1878.

JURISDICTION.—ACTION BY ASSIGNEE IN BANKRUPTCY.—FRAUDULENT CONVEYANCE.—CHATTEL MORTGAGE.—CREDITOR'S ACTION BY TRUSTEES.

The State courts have jurisdiction of an action, by an assignee in bankruptcy to disaffirm, and treat as void a debtor's transfer of his property, in fraud of the creditors* (*Frost v. Hotchkiss*, 1 *Abb. N. Cas.* 27 ; S. C., 14 *Bankruptcy Reg.* 443, distinguished).

An uninterrupted possession and continued disposal and replenishing of a fluctuating stock in trade, under a chattel mortgage, proceeds of sales being used by the mortgagor to pay general liabilities and current expenses, raises a sufficient presumption of fraud, under the statute, to go to the jury, although the mortgage was duly filed.

It is for the jury to say, under such circumstances, whether the mortgage was made in good faith.

In such case it is proper to instruct the jury that, if the mortgage was not fraudulent, and the mortgagees knew of the sales, but supposed the proceeds were to be applied to the payment of their debt, the mortgagees were entitled to a verdict.

Upon the converse of this proposition the plaintiff would be entitled to a verdict.

Under the act of 1858, c. 314,—allowing executors, administrators, assignees and other trustees, to disaffirm, for the benefit of creditors, transfers in fraud of creditors,—a trustee need not obtain judgment before commencing a creditor's action to set aside a transfer as fraudulent.†

* See also *Wheelock v. Lee*, p. 72 of this volume.

† For recent cases on the general rule requiring other creditors to have judgment, see *Miller v. Miller*, 7 *Hun*, 208 ; *Same v. Same*, 1 *Abb. N. Cas.* 30 ; *Schnitzer v. Cohen*, 7 *Hun*, 665 ; *Estes v. Wilcox*, 67 *N. Y.* 264 ; *Spicer v. Ayres*, 2 *Sup'm Ct. (T. & C.)* 626 ; *Ballou v. Jones*, 13 *Hun*, 629 ; *Geery v. Geery*, 63 *N. Y.* 252 ; *Produce Bank v. Morton*, 67 *Id.* 199.

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Hence an assignee in bankruptcy can bring such an action, without having recovered judgment.

Collins' case, 12 *Blatchf.* 548, distinguished, as not applicable to a case of actual fraud.

A chattel mortgage, with an extrinsic agreement or understanding pursuant to which the mortgagor remaining in possession, from time to time sells, and from time to time replenishes the stock, applying proceeds of sales to his own uses or debts other than the mortgage debt, is void as in fraud of creditors.

The agreement rendering the mortgage thus fraudulent, may be proved by extrinsic evidence.

Appeal from a judgment.

The action was brought by Charles C. Southard, as assignee in bankruptcy of Wm. H. Decker, against Hiram Benner and William Pinckney.

On December 4, 1879, William H. Decker executed a chattel mortgage to defendants, who were copartners, to secure payment of \$30,000 on demand. The mortgage covered lumber of various kinds, being all the stock owned by the mortgagor, who continued in business until adjudged a bankrupt, December 15, 1873. During the period above mentioned, Decker sold this lumber at the rate of about \$30,000 a month, and made purchases to replenish his stock. No separate account was kept of the lumber mortgaged and that subsequently bought, and the proceeds of the sales were used by the mortgagor to meet his general liabilities and living expenses. On February 3, 1874, defendants foreclosed the mortgage, and realized from the sale thereunder the sum of \$2,217.36.

Plaintiff, as assignee in bankruptcy, now brought suit to recover the proceeds of the foreclosure, claiming that the mortgage was void.

Judgment was given in his favor for the sum named, with interest.

The cause was tried before Mr. Justice VAN BRUNT, whose instructions to the jury, material to the decision on appeal, were as follows :

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VAN BRUNT, J.—The question in this case is, whether this mortgage is fraudulent in law. If the defendants in this case have established to your satisfaction that this mortgage was not fraudulent either in law or fact, but that it was made in good faith and not for the purpose of hindering or defrauding the other creditors, they are entitled to a verdict. But if the understanding of these parties was, at the time that this mortgage was made, that this mortgage included all the stock in trade of Mr. Decker, and that he should go on and sell that stock in trade and use the money for his own benefit, the law says that is fraud, and it will not permit a mortgage of that kind to be sustained. If, upon the other hand, you find from the evidence in the case that there was no arrangement or understanding between these parties to that effect, but that the sales were made with the knowledge of these mortgagees, and they supposed that the money was going to be applied to the payment of their debt, then there was no fraud in law. There must be an intention to defraud the creditors of Mr. Decker, and an honest intention to secure the debt which was due from Mr. Decker to Benner & Pinckney is not such an intention. Now that is the issue you are called upon to determine in this case. If you find, from the facts in this case, that it was the intention of these parties, that the understanding was, that Mr. Decker should go on and sell this property and use the money,—that is, the proceeds of the property covered by this mortgage,—then there is fraud, and the plaintiff is entitled to a verdict. If, upon the other hand, you find that the defendants knew that Mr. Decker was going on and selling this property covered by the mortgage, and that they supposed that the proceeds arising therefrom was to be applied to pay them their debt, then there was no fraud in law, and the defendants would be entitled to a verdict at your hands. That is the issue, and that is

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the question to which you are to apply the evidence, and upon which you are to pass. Now, the plaintiff in this action claims that it was the understanding between these parties, and that the defendants knew that Mr. Decker was selling this property and was applying the money to his own use generally. If that was the fact then of course it comes in conflict with the rule which I have already laid down for your guidance. On the other hand, the defendants claim that whatever knowledge they had in regard to the selling of the merchandise or lumber covered by the mortgage was consistent with the idea that Mr. Decker was applying that money to the payment of these debts which were covered by the mortgage. If you find that was the intention of the parties, and that that was their joint belief, and that there was no fraud in the contracting of this mortgage by the defendants, then they are entitled to a verdict.

After some exceptions had been taken, his Honor added :

"I desire to charge you, that if you find that it was the understanding of these parties, at the time that this mortgage was made, that Mr. Decker was to go on and sell part of this stock, and use the money generally in his business, that was fraudulent in law.

"I also desire to charge you that in considering that question you have a right to infer that such was the agreement, if the defendant permitted such things to be done after the mortgage was made."

After judgment on the verdict defendants appealed.

A. J. Vanderpoel & James K. Hill (Mr. Hill, attorney), for defendants, appellants, insisted :—I. That as the mortgage was filed and valid on its face, fraud could not be presumed, and that the burden was on plaintiff to show that defendants knew of the sales,

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otherwise the fact of sales was immaterial (*Chatham Bank v. O'Brien*, 6 *Hun*, 231).

II. The burden was on the plaintiff to show intent to defraud, but the judge, in effect, put the burden on defendants to show the contrary.

III. The corrections to the charge were erroneous in allowing the jury to infer agreement if the defendant "permitted such things to be done." Permission does not imply even knowledge, but merely not prohibiting.

IV. The question of fraud in law could not be submitted to the jury. The question was of good faith, as matter of fact (*Ford v. Williams*, 24 *N. Y.* 359). And the fact of sales with the knowledge of the mortgagor does not alone render fraudulent (*Frost v. Warren*, 42 *N. Y.* 204).

V. The assignee in bankruptcy cannot maintain this action (*Frost v. Hotchkiss*, 1 *Abb. New Cas.* 27; *S. C.*, 14 *Bank. Reg.* 443).

Field & Deyo, for plaintiffs, respondents,—Relied on the cases cited in the opinion in the text, and *Chatham National Bank v. O'Brien* (6 *Hun*, 231), and distinguished *Frost v. Hotchkiss*.

BY THE COURT.—LARREMORE, J.—No objection was made on the trial to the jurisdiction of the court. But on the argument of the appeal it was urged that plaintiff, as assignee in bankruptcy, could not maintain this action in a State court. Section 711 of the revised statutes of the United States confers upon the federal courts exclusive jurisdiction of all matters and proceedings in bankruptcy; but this is not a proceeding in bankruptcy. The act to declare and extend the powers of executors, assignees, and trustees, and protect creditors from fraud (*L.* 1858, ch. 314) authorizes an assignee of an insolvent for the benefit of creditors to disaffirm and treat as void all transfers made of any estate or prop-

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erty in fraud of the rights of any creditor (3 *R. S.* p. 226, 5th Ed.).

Our attention has been called to the case of *Frost v. Hotchkiss* (1 *Abb. New Cas.* 27; S. C., 14 *Bank. Reg.* 443) as an authority upon the question of jurisdiction. There the suit was brought, not by the assignee, but by a trustee in bankruptcy (chosen as such at a meeting of the creditors),* to recover real estate conveyed by the bankrupt to his wife in fraud of creditors. The court on demurrer held that the State court had no jurisdiction, and properly so held; for section 5,103 of the revised statutes of the United States, in pursuance of which such trustee was chosen expressly declares that the winding up and settlement of any estate under its provisions shall be deemed to be proceedings in bankruptcy. The sections of the act defining the powers and duties of an assignee in bankruptcy do not prohibit a suit by him at law in a State court against a party whom the debtor might have sued. We are of opinion, therefore, that plaintiff had legal capacity to sue in this court (*Cook v. Whipple*, 55 *N. Y.* 150).

The first exception taken at the trial was to the denial of the motion to dismiss the complaint on the ground that no cause of action had been established. In this we think there was no error. The statute of frauds expressly declares that every assignment of goods and chattels by way of mortgage, unless accompanied by immediate delivery and followed by an actual and continued change of possession of the thing mortgaged, shall be presumed to be fraudulent and void as against creditors of the mortgagor, and shall be conclusive evidence of fraud unless it shall be made to appear that the transaction was in good faith and without intent to defraud (2 *Edm. R. S.* 140, § 5; Same stat., 3 *R. S.* 6th ed. p. 143). The unin-

* Under U. S. R. S. §§ 5,046, 5,103.

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interrupted possession and disposal of the mortgaged property by the mortgagor raised the statutory presumption of fraud as to the validity of the transaction; and it was the province of the jury to decide, upon the facts and circumstances presented, whether or not the mortgage was made in good faith (*Ford v. Williams*, 24 *N. Y.* 359).

The remaining exceptions as to the judge's charge and refusals to charge may be considered under one head. The jury were instructed that if the mortgage was not fraudulent and defendants knew of the sales of lumber, but supposed the proceeds were to be applied to payment of their debt, they were entitled to a verdict. Upon facts showing the converse of this proposition the plaintiff would be entitled to a verdict. The charge of the learned judge was in conformity with the law as settled in *Gardner v. McEwen* (19 *N. Y.* 123); *Ford v. Williams* (24 *Id.* 359); *Conkling v. Shelley* (28 *Id.* 363); *Miller v. Lockwood* (32 *Id.* 293); *Frost v. Warren* (42 *Id.* 207). There was nothing said that could have misled the jury, and no valid reason has been shown for disturbing the verdict.

Judgment affirmed, with costs.

Defendants appealed to the court of appeals.

Samuel Hand, for the appellants.

R. E. Deyo, for respondents.

ALLEN, J.—A creditor at large cannot assail an assignment or other transfer of property by the debtor as fraudulent against creditors, but must first establish his debt by the judgment of a court of competent jurisdiction, and either acquire a lien upon the specific property, or be in a situation to perfect a lien, and subject it to the payment of his judgment upon the removal of the obstacle presented by the fraudulent assignment or transfer.

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Every assignment or conveyance of property with intent to hinder, delay, or defraud creditors, is void as against creditors, not only at common law but by statute, and every conveyance or transfer of chattels not followed by an actual and continued change of possession, is presumed to be fraudulent as against creditors, and such want of change of possession is conclusive evidence of fraud, unless it be shown that the same was not made with intent to defraud. The term "creditors," as used in the statute, includes all persons who are creditors of the vendor or assignor at any time, whilst the goods remain in his possession, or under his control (2 R. S. 136, §§ 5, 6). A creditor by simple contract is within the protection of the statute as much as a creditor by judgment; but until he has a judgment and a lien, or a right to a lien, upon the specific property, he is not in a condition to assert his rights by action as a creditor (*Geery v. Geery*, 63 N. Y. 256; *Frisbee v. Thayer*, 25 W. R. 396). The plaintiff, as assignee in bankruptcy, represents the whole body of creditors, and may in their behalf impeach a conveyance of property by the bankrupt as fraudulent, wherever the creditors might or could by any process acquire the right to contest its validity.

By the statute of this State (*Laws of 1858*, c. 314), any executor, administrator, assignee or other trustee of an estate or the property and effects of an individual, may, for the benefit of creditors or others interested in the estate or property so held in trust, disaffirm and treat as void all transfers in fraud of the rights of any creditors or others interested and maintain all necessary actions for that purpose. This act, conferring special authority for the benefit of creditors, dispenses with the necessity of any special or other lien in behalf of individual creditors. The act is not for the enforcement of specific liens for the benefit of individual creditors. No statute was necessary for

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that purpose, as each creditor having such lien could vindicate his rights under the law as before administered. This act gave a new remedy in favor of creditors at large, by giving to an assignee or trustee for their benefit a statutory right to property conveyed in fraud of creditors, and this statutory right took the place of the specific lien of individual creditors required by law as a condition of their right to contest the validity of the transfers. The bankrupt law of the United States in express terms vests in the assignee all property conveyed by the bankrupt in fraud of creditors, and thus gives him a title to all property so conveyed, and supersedes the necessity of a judgment and execution lien in favor of any or all the individual creditors (Bankrupt Act, § 14 ; *U. S. R. S.* §5,046). The policy of the bankrupt law is to secure an equal distribution of all the property of the bankrupt among his creditors, and this object would be defeated if a fraudulent assignor could set the fraudulent assignee at defiance, and a fraudulent conveyance not be contested by the assignee. Creditors could not well do it after a decree in bankruptcy. They would be practically remediless. The bankrupt court would be a place of refuge for every debtor who had fraudulently disposed of his property, and the bankrupt act a perfect shield for fraud. The assignee represents the creditor's rights without the technical obstructions to the enforcement of those rights by a creditor at large. It was held by the late Judge HALL, of the northern district of New York, that the assignee, represented the whole body of creditors, and that it was his right and duty to contest the validity of any mortgage by which one creditor had obtained a preference over another (*In re Metzger*, 2 *Bank. Reg.* 355).

The same principle was asserted by CHASE, Ch. J., in the circuit court of Virginia, in Wynne Case (4 *Id.*

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23), and by Judge CURTIS, in *Carr v. Hilton* (1 *Curtis*, 230).

The latter judge says: "A fraudulent conveyance is no effectual conveyance, as against the interest to be defrauded. This interest the assignee represents, so far as respects all creditors who prove their claims."

In *Collins' Case* (12 *Blatchf.* 548), fraud was not alleged. The validity of the chattel mortgage was contested upon the sole ground that it had not been filed as required by law, and Judge HUNT held that within the terms of the act none but creditors who had, by judgment and execution, obtained a specific lien on the thing mortgaged, or subsequent purchasers or mortgagees in good faith, could attack the mortgage, for the reason alleged, and that the assignee was not within the benefits of the statute. The reasoning of the learned judge, it must be conceded, would apply to a mortgage alleged to be fraudulent in fact; but in following it as an authority, we think the principle should not be extended so as to prove a shield to actual fraud. The non-compliance with a statute, merely imposing a new condition to the validity of chattel mortgages, for the protection of the particular classes mentioned, and not involving the question of fraud or fraudulent intent, may well be restricted in its operation to the individuals for whose immediate protection it was passed. Upon sound reason, the policy of the law, as well as the authorities quoted, and others that might be referred to, there can be no doubt, we think, that the plaintiff, as assignee, has a right of action for property conveyed by the bankrupt in fraud of his creditors, although none of the creditors have acquired a specific lien.

It is not such liens or any particular interest in the property, or an interest for the benefit of any one creditor or class of creditors, that is vested in the assignee, but the entire property fraudulently transferred, and

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for the benefit of all the creditors. The assignee takes title, not under any claim of right existing in the creditors, but under the statute, and that right he may assert by action, although no individual creditor, or all the creditors combined, could have a standing in court to challenge the conveyance.

The case was not submitted to the jury upon the presumption of fraud, arising from the want of a change in the possession. There was no such change, and the presumption by statute was, that the mortgage was fraudulent and void for that reason, and such presumption was conclusive unless the defendants satisfied the jury by evidence that it was not made with intent to defraud, and such would have been the proper instruction to the jury if that had been the only circumstance relied upon to impeach the transfer (2 R. S. 136, § 5).

Evidence was given that from the time of making the mortgage to the defendants, the mortgagor continued to deal with the mortgaged property, consisting chiefly of lumber materials, in which he was a dealer, as he had been accustomed to do, buying and selling as opportunity offered, and using the proceeds of his sales to meet his liabilities, and in the prosecution of his business in all respects as if no mortgage was in existence, and there was evidence tending to prove that business was thus carried on, and the mortgaged property dealt with and sold by the permission of the defendants. This, with the other facts, of which there was also evidence that the defendants had, from the time of making the mortgage for several months thereafter employed a Mr. Brown in and about the business of the lumber yard of the mortgagor, acting with and under him, to look after their interests, and that the mortgages were made to secure advances, to enable the mortgagor to continue his business, made it a question for the jury whether this continued dealing with, and

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sales of the mortgaged lumber was not in pursuance of an arrangement between the parties contemporaneous with the giving of the mortgage, that the mortgagor should continue his dealings with and sales of lumber as before, notwithstanding the mortgage. That question was submitted to the jury, and they have found the arrangement as suggested.

The instruction to the jury upon which the case hinged, as explained and qualified upon a recalling of the jury for such explanation, and to avoid a misapprehension, was, that if they found that it was the understanding of these parties at the time the mortgage was made, that Mr. Decker, the mortgagor, was to go on and sell part of this stock and use the money generally in his business, that was fraudulent in law. The charge was equally explicit, that unless they found such to have been the understanding, and the sales had, in fact, been made without the knowledge or assent of the defendants, they would be entitled to a verdict. There was no error in charging the jury that the understanding referred to might be inferred if the defendants had permitted the sales to be made as alleged. It is the province of the jury to make all necessary inferences from the facts proved, and the existence of the arrangement and understanding was a material and necessary inference from the undisputed facts.

The question then is, did the arrangement, if made as alleged, and carried out by the permitted sales of and dealing with the mortgaged property, necessarily invalidate the mortgage? Did it conclusively prove that the mortgage was fraudulent in law; that is, so conclusively establish the fraud that a verdict of the jury to the contrary would have been set aside as against evidence? Such an arrangement is incompatible with a mortgage designed only as security to the mortgagee. The dealing with the mortgaged property

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as merchandise by the mortgagor, and the sale of the same in the ordinary course of business as a merchant, with the consent of the mortgagee, necessarily destroys the value of the mortgage as a security, and makes it only available, if for any purpose, so long as this arrangement and dealing continues to protect the property from creditors and secure it to the mortgagor. Such a transaction is necessarily fraudulent. It hinders and delays other creditors without securing the application of the property or its avails to the payment of the mortgage debt.

In *Frost v. Warren*, 42 *N. Y.* 204, it was held that the fact that the mortgagor continued to sell the mortgaged property, consisting of goods in a store with the knowledge of the mortgagee in the absence of proof, that this was pursuant to an agreement between the parties, did not render the mortgage fraudulent in law as against other creditors, clearly implying that such an agreement, and a selling of the goods in pursuance of it, would constitute fraud in law, that is, be conclusive evidence of fraud. Here the jury have found the agreement upon evidence that could warrant no other conclusion. Advances made to enable the mortgagor to continue his business as a dealer in lumber, the entire stock of the dealer mortgaged to secure the advances, an agent of the mortgagees designated and appointed to supervise the business and watch their interests, sales continued by the mortgagor as before, and the avails used by him for his support, and as his wants and business calls demanded, and this continued for a full year, the mortgagee receiving not the avails of the mortgaged lumber, but such moneys as the mortgagor could spare from the general business,—all point to but one conclusion, that this was in pursuance of an agreement between the parties, cotemporaneous with the mortgage. Such an arrangement, included in and making a part of the written instrument of mort-

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gage, would clearly invalidate it as fraudulent in law as that term is understood; that is, would be conclusive evidence of fraud in fact, and would be so held by the court as matter of law. This was decided in *Edgell v. Hart*, 5 *Seld.* 213. Whether the agreement is in or out of the mortgage, whether verbal or in writing, can make no difference in principle. Its effect as characterizing the transaction would be the same. The difference in the modes of proving the agreement cannot take the sting out of the fact and render it harmless. If it is satisfactorily established, the result upon the security must be the same.

It is the fact that such an agreement has been made and acted upon, that in law condemns the security, and not the fact that it is proved by the instrument of such suretyship, instead of by parol or in some other way. This question is considered by Judge DENIO in *Gardner v. McEwen* (19 *N. Y.* 123), and by Judges GROVER and WOODRUFF in *Russell v. Winne* (37 *N. Y.* 591), and although not expressly decided in either case, it is very conclusively shown, by the reasoning of those learned judges, that an agreement, by which the mortgagee is permitted to deal with the mortgaged property outside of the mortgage, and proved by parol, is equally fatal to the security, as if made a part of the written mortgage.

The judge presiding at the trial of this action adopted the principle adjudged in *Edgell v. Hart*, and applied it to an agreement proved by evidence *aliunde* the mortgage in accordance with the views of the judges named. We are of the opinion that the correct rule was applied, and that there was no error of which the defendants can complain, in the submission of the case to the jury.

[Remarks on a claim not necessary to notice are omitted.]

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The judgment must be affirmed.

All the judges concurred, except ANDREWS, J., who was absent.

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N. Y. Supreme Court, First Department; Special Term, March, 1878.

USURY.—CHATTEL MORTGAGE.

The rule that equity will not allow a mortgagee to clog the equity of redemption with any bye agreement,—stated.

The simultaneousness of two agreements between the same parties is not alone enough to bring a case within the rule.

The owner of musical compositions and the plates for printing them mortgaged the plates and assigned the copyrights to a creditor to secure the debt and new advances and interest, and with an agreement that the creditors should do all the mortgagor's printing and receive one-half the profits of all the music they should print, over and above the cost of printing and materials.

Held, that the contract, being freely made, was neither unconscionable nor usurious.

It would not necessarily be usurious even if made as a condition of the loan.

What is evidence of fairness or unfairness in the conduct of an auction sale of plates and copyrights, in which many persons are interested.

An auction sale of chattels, duly made by virtue of a mortgage, extinguishes the equity of redemption, although they are bought in by the mortgagee.

If the mortgage has become absolute by lapse of time and default, the mortgagor must make a tender before commencing an action to redeem. An offer in pleading is not enough.

Where the court did not sustain any part of the plaintiff's demand for relief, they refused to pass on any questions arising between co-defendants.

Action for an accounting and other relief. Trial by the court.

This action was brought by Thomas J. Hall, as surviving partner of William Hall, deceased, against

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Oliver Ditson, John C. Haynes and Charles H. Ditson, composing the firm of Oliver Ditson & Co., the executors of William Hall, and others, to obtain a resale of mortgaged personal property of the firm of William Hall & Son, on the ground that the same had been fraudulently sold by the defendants, Ditson & Co., also for an accounting and other relief.

The material facts out of which the action arose are as follows: Prior to May 5, 1862, William Hall and James F. Hall composed the firm of William Hall & Son, and carried on the business of publishers of, and dealers in, musical compositions. On that date said firm was dissolved, and William Hall was made liquidating partner, and carried on the business alone until February 1, 1866, when he received Thomas J. Hall as a partner, and a new firm of William Hall & Son was formed. Each of the aforesaid firms became the owner of great numbers of copyrights for musical compositions.

About December 19, 1871, the said firm of William Hall & Son gave their bond for \$10,000 to one William A. Pond for money loaned by him, and also, to secure the same, a chattel mortgage on the plates and copyrights of certain musical compositions, which copyrights were also at the same time duly assigned to said Pond. Near the time that this mortgage was made, but subsequent thereto, William Hall & Son made an agreement with said Pond to print their musical compositions and share the profits.

On December, 1872, the aforesaid firm made another mortgage for \$7,678.78 on the same chattels, to Edward A. Morrison, payable on demand.

On January 10, 1874, the same firm made still another mortgage on the same property for \$7,048.39 to O. Ditson & Co., which said sum was composed of cash advances to the former by the latter, and a balance of account for merchandise. On the same day,



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William A. Pond, who had been pressing William Hall & Son for payment of his mortgage, assigned it to said O. Ditson & Co., who paid the full amount and value thereof. At the same time said Pond assigned to O. Ditson & Co., all his right, title and interest in the said copyrights assigned to him as above stated.

Upon the same day as the execution of the mortgage to Ditson & Co., but after said bond and mortgage had been executed and delivered, and the Pond mortgage assigned, and all the money and consideration for both bonds and mortgages paid, and after Ditson & Co. had given the said firm the option to enter into it or not, as they might choose, the latter made an agreement with the former to do their printing, similar to the one they had formerly made with Pond.

After this agreement had been executed and delivered, Ditson & Co. unconditionally offered to surrender and give it up, but Hall & Son voluntarily refused the offer, and requested that the agreement should stand, and its provisions be carried out.

William Hall, the senior member of the firm, died in May, 1874, and the plaintiff, Thomas J. Hall, carried on the business as surviving partner.

In February, 1873, the aforesaid Edward A. Morrison assigned his said bond and mortgage to O. Ditson & Co., who paid therefor the amount then due thereon.

On or about December, 1876, and shortly before the aforesaid bonds and mortgages, the payment of which had been extended from time to time, became due, Ditson & Co., and the plaintiff, as surviving partner of William Hall & Son, settled and adjusted all the claims, accounts and demands existing between them, and found and agreed upon the sum of \$22,474 as due from the plaintiff, and adjusted it by the plaintiff agreeing for himself, and as survivor of William Hall & Son, to pay, and Ditson & Co. agreed to accept in

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full satisfaction of such balance due, the sum of \$21,000 before January 8, 1877, and satisfy their liens and claims.

After the said bonds and mortgages became due, said plaintiff not having paid the \$21,000, according to agreement, and the said mortgages not having been paid, O. Ditson & Co. took possession of the property and advertised and sold the same at public auction in the city of New York, the plaintiff, as surviving partner of William Hall & Son, having agreed in writing to such sale in case he should fail to pay the \$21,000 as aforesaid. The sale was found to have been honestly and fairly made by Ditson & Co., who bought the property for \$10,000.

At the sale Thomas J. Hall put forward a claim of his wife to a portion of the property: the defendant, James F. Hall, interposed a claim of one-half interest in a large but undefined share of the copyrights: one of the executors objected to the sale, stating that it was illegal because he had not received notice thereof, &c.: and the attorney of Thomas J. Hall, not only representing the latter, but also the alleged owner of a previous mortgage of \$6,000 and interest since 1870, stated that that mortgage covered the property, and it would be enforced against any one who should purchase the property.

There was no tender of payment made before bringing this suit, but in the complaint the plaintiff offered to pay the expenses of a resale and the amount found due upon the said mortgages upon an accounting.

Other material facts sufficiently appear in the opinion.

Algernon S. Sullivan and Robert L. Fowler (Sullivan, Kobbé & Fowler, attorneys), for plaintiff.—This action is properly brought for an account (*Pratt v. Stiles*, 17 *How. Pr.* 222; *Parker v. Alcock, Younge*, 369;

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Bloxham v. Pell, cited 2 *Wm. Blacks.* 999). This is an action to redeem (*Fisher on Law of Mort.* 73; *Cholmley v. Countess of Oxford*, 2 *Atk.* 267; *Palk v. Clinton*, 12 *Ves.* 63; *Hasbrouck v. Vandervoort*, 4 *Sandf.* 78; *Kemp v. Westbrook*, 1 *Ves. Sr.* 278; 2 *Story Eq.* 1032). All the defendants are necessary parties (*Coote on Mort.* 537; *Osbourne v. Fallows*, 1 *Russ. & Mylne*, 741; *Henly v. Stone*, 3 *Beav. Ch.* 355; *Cholmondeley v. Clinton*, 4 *Bligh*, 1; *Code of Pro.* §§ 118, 274; *Code of Civ. Pro.* §§ 447, 1204). A chattel mortgage is not a bill of sale on condition, but a mere collateral security (*Hall v. Sampson*, 35 *N. Y.* 274; *Charter v. Stevens*, 3 *Den.* 33; *Pulver v. Richardson*, 3 *Sup'm Ct.* 436); and a mortgagee of chattels is bound to sell in order to foreclose the equity of redemption (*Patchin v. Pierce*, 12 *Wend.* 63; *Pratt v. Stiles*, 17 *How. Pr.* 221). The old doctrine of forfeiture after the law day no longer exists (*People, use of Farrington, v. Bristol*, 3 *Law and Eq. Rep.* No. 7, p. 196; *Hulsen v. Walter*, 34 *How. Pr.* 388). Where a chattel mortgagee is a purchaser of mortgaged chattels, he remains a trustee, and the equity of redemption is not cut off (*Pulver v. Richardson, supra*); and the mortgagor is entitled to a resale and for a decree that he may redeem (*Story Eq. Jur.* 1062; 2 *Mass. Cir. Ct.* 244, 251). The mortgagee should not take possession of property and greatly enhance its value before sale (*Mickles v. Dillaye*, 17 *N. Y.* 84). Ditson & Co., having a share of profits, are partners as to outside creditors (*Coll. on Partn.* 43; *Exp. Hamper*, 17 *Ves.* 42). The court will not allow the mortgagee to clog the equity of redemption with any bye agreement (*Jennings v. Ward*, 2 *Vern.* 520), nor to enter into any oppressive agreement at time of execution of loan (*Price v. Perrie*, 2 *Free.* 258; *Willett v. Winnell*, 1 *Vern.* 488; *Bowen v. Edwards*, 1 *Ch.* 222; *Thornhill v. Evans*, 2 *Atk.* 330). The mortgaged property must be disposed of at a fair

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sale (Case v. Boughton, 11 *Wend.* 106). The surviving partner has exclusive control of the partnership property only for such purposes as closing up the business, and matters in course of liquidation (Evans v. Evans, 9 *Paige Ch.* 180; Matheson v. Field, 3 *Robt.* 47; Loeschigk v. Addison, 4 *Abb. Pr. N. S.* 214); and it is not true that in all cases a survivor alone has power to avoid partnership contracts; the test being, was it partnership property at the death of the deceased partner? (Daby v. Ericsson, 45 *N. Y.* 786; *Story on Part.* 346). It is too late for objection to the trial on the issues (Fonda v. Sage, 46 *Barb.* 109). An account rendered is not conclusive on the parties (Stenton v. Jerome, 54 *N. Y.* 480; Champion v. Joslyn, 44 *Id.* 653; Manhattan Co. v. Lydig, 4 *Johns.* 377; Hutchinson v. Market Bank of Troy, 48 *Barb.* 302; Kock v. Bonitz, 4 *Daly*, 117). This case is precisely analogous to a partition (Bogardus v. Parker, 7 *How. Pr.* 305; *Daniel's Ch. Pr.* 190). The executors are necessary parties (Williamson v. Field, 2 *Sandf. Ch.* 533).

Erastus Cook (*Estes & Barnard*, attorneys), for defendant, Ditson & Co.

Charles W. Sanford, for executors of William Hall.

Edward Patterson, for James F. Hall.

VAN VORST, J.—The plaintiff claims that the printing contract, bearing even date with the chattel mortgage executed by Hall & Son to the defendants, Ditson & Co., was a hard and unconscionable agreement and a clog upon the mortgage. He does not, however, urge that the transaction was usurious.

The executors, &c., of the last will of William Hall, deceased, who are made defendants, by their answer interpose a claim that the mortgage was usurious in its inception, the usury growing out of the advantage gained by the mortgagees through the

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printing contract, which it is claimed was part and parcel of the transaction through which the moneys were loaned, for the security of which the chattel mortgage was in part made, and that the printing contract was exacted by the mortgagees and yielded by the mortgagors, and that the transaction was designed to secure to the mortgagees an advantage in the way of gain over and above the legal interest they would realize on the loan and forbearance of the money advanced and secured by the mortgage. These defendants also claim that the vice of usury enters into the Pond mortgage, which was assigned to Ditson & Co. at the time the mortgage and printing contract above-mentioned were made and delivered.

The plaintiff claims that the agreement should be set aside as unconscionable ; the executors claim that the mortgages are void for usury.

Equity will not, as is urged by the learned counsel for the plaintiffs, allow a mortgagee to clog the equity of redemption with any bye agreement, and will not uphold any oppressive arrangement or advantage exacted by the mortgagee at the time of the loan of money.

But a careful consideration of the evidence fails to disclose anything in the circumstances under which the printing contract was executed hard or unconscionable on the part of Ditson & Co., or anything in a true sense unfair or inequitable in the arrangement, even though it be considered as standing by itself apart from the mortgage. It was not so regarded at the time, nor have subsequent events demonstrated it to be such. Carried out according to its true intent, the printing contract secured rights and interests of mutual advantage.

A similar agreement had been made by Hall & Son with William A. Pond in December, 1871, on an occasion when they borrowed money from him. No

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complaint appears to have been made at any time that such agreement was hard or unfair in its terms or operation, or that Pond had secured thereby any unfair advantage or disproportionate gain.

The fact that Hall & Son were willing, under the circumstances disclosed by the evidence, freely and of their own accord, to enter into a similar arrangement with Ditson & Co., would indicate that the arrangement was by them regarded as favorable to their interests.

The evidence does indeed justify the conclusion that the agreement for the loan of money by Ditson & Co., and the postponement of the payment of their existing claim against Hall & Son, the payment of which was to be secured by a chattel mortgage on the music plates and copyrights, was made at the same time when the terms of the printing contract were agreed upon.

In one sense they were truly part and parcel of one general arrangement, and were in the end formally put in shape on the same occasion at the office of Messrs. Estes & Barnard.

Yet under the evidence I cannot say that they were absolutely and unqualifiedly dependent the one on the other. It may well be that the fact that the printing contract was also tendered and to be executed, was a controlling reason inducing Ditson & Co. to agree to make the loan and postpone payment, and to take up the Pond and Morrison mortgages. But, in the end, after the Pond and Morrison mortgages had been assigned and the money paid therefor, and the mortgage to Ditson & Co. had been executed by Hall & Son, the option was distinctly and unqualifiedly left with them as to whether they would execute the printing contract, and they without hesitation concluded to do so.

It is suggested by plaintiff's counsel, that the offer

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to abandon the printing contract at this time, made by Ditson & Co., was neither sincere nor honest. I do not know that we are justified in detracting from the offer made by Ditson & Co., the elements of sincerity and honesty. In making the offer, Ditson & Co. may have supposed that Hall & Son would not withdraw, but that they would be still willing, and perhaps claim that the printing contract should be made and that they should assume the responsibility of making advances under it. I think that the speech and acts of parties are entitled to be considered as springing from good and honest motives when the facts and circumstances do not establish the contrary, and that parties mean what they say. But the fact that Ditson & Co. then expressed a willingness to give up the printing contract is distinctly proven, and strips the transaction of that hardness and severity which is sought to be impressed on it, if there be in fact any thing inequitable in its terms. There was a *locus penitentiae* for Hall & Son, and the option was tendered them of withdrawing from that part of the agreement.

That they then expressed a desire for the contract is well established by the evidence, and they freely made it. There is a fair inference to be drawn from the evidence that it was for the real advantage of Hall & Son that the printing contract with Ditson & Co. should be made. Hall & Son were in straightened circumstances; they had not the means at hand to carry on the work of printing promptly. They were then largely in arrear to the printer for work theretofore done, and encountered difficulty in discharging the obligation, and further work was to be paid for as the work was done.

Under the printing contract Hall & Son were entitled to receive one-half of the profits of all music which Ditson & Co. should print from the plates over

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and above the costs and expense of printing and materials furnished.

While I can see that such arrangement would be of advantage to Hall & Son, I am not prepared to say that one-half the profits would be an undue proportion of advantage to be realized by Ditson & Co. for their advances, care and risk in carrying out the arrangement. Hall & Son reserved to themselves the right to print for their own business from the plates. The arrangement was well and clearly understood, and was without doubt deemed to be of mutual advantage. And when the contract was executed, Hall & Son expressed the hope that Ditson & Co. would produce and sell more music than Pond had done under his contract.

I cannot, therefore, conclude that there was anything in the circumstances under which this contract was made, or in the contract itself, which entitles the plaintiff to any relief against it for the reasons assigned by him. It was voluntarily and understandingly entered into by them, after an experience under a similar contract made some years before with Pond, through which they had a proper comprehension of the advantages and operation of such an arrangement. There is no satisfactory evidence that it was forced upon or exacted from them. They were under no compulsion; and I fail, even now, to see why the arrangement was not of advantage to them.

I do not think that the transaction is obnoxious to the vice of usury, as is urged by the executors of William Hall, deceased. The scheme, in my opinion from the evidence, was not resorted to by Ditson & Co. to realize more than legal interest on the loan and forbearance of money. Although the two transactions, —the loan and forbearance of money and the printing contract,—were originally contemplated by the parties as parts of one general arrangement, yet they were in

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themselves divisible. The loan and forbearance of money and the printing contract are represented by separate instruments. The mortgage secured to Ditson & Co. legal interest on the moneys secured thereby. The printing contract provides for a distribution of profits to be realized on the music printed by Ditson & Co. on the plates of Hall & Son. The materials and necessary funds were to be supplied by Ditson & Co.

It was not stipulated by Hall & Son that there would be any profits. It was not an assured matter that there would be any gains. There might and might not be profits. The result was speculative—dependent upon the cost of production, and the result of sales.

Ditson & Co., who made the advances, assumed the risk of there being sufficient sales in the end at remunerative prices to justify the printing.

Conceding that Ditson & Co. originally made the loan and forbearance of money dependent upon the making of the printing contract, still I do not think that such arrangement would be necessarily usurious. The printing contract was a business operation, and by its terms is not shown in itself to be unfavorable to Hall & Son. The market was not at the time well supplied with their music, and it was essential to Hall & Son that it should be, to maintain the value of their copyrights and plates. Hall & Son were unable to conduct the business profitably. Ditson & Co. were responsible parties. The printing contract might well stand on its own merits as a good and satisfactory arrangement, separate and apart from the loan of money, and as truly beneficial to Hall & Son.

This case is in many respects analogous to *Clarke v. Sheehan* (47 N. Y. 188), and upon the principles therein announced the transaction is not usurious, and the same result applies to the Pond mortgage, of which they took an assignment. In disposing of the claims of the plaintiff and the executors of William Hall and

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son above discussed, I cannot resist the conclusion that the interposition of Ditson & Co. at the solicitation of William Hall, was under the evidence timely, considerate and advantageous to Hall & Son. They advanced the money, \$10,000, to relieve Hall & Son from the Pond mortgage, which was due, and its payment urged. They advanced the money to satisfy the holder of the Morrison mortgage, and extended the payment of their own debt and made an additional loan of \$4,000. They also took a printing contract for two years, by the terms of which, Hall & Son, besides reserving to themselves the right to print from the plates for their own trade, were entitled to receive one-half the profits on what Ditson & Co. might print. The arrangement as a whole and in parts is not open to the objections urged.

[After disposing of an incidental question, the learned judge continued :]

I have carefully considered the evidence relating to the sale of the property under the mortgages, and cannot agree with the plaintiff's counsel that the same was unfairly made, or that it should be set aside by occasion of any act or omission of Ditson & Co. I am, on the other hand, of the opinion from the evidence that the mortgagees made reasonable efforts to secure a favorable sale of the property after all attempts to adjust the matters with the plaintiffs had failed. I think that the statements made by the auctioneer and the defendant Haynes described the property covered by the mortgages with sufficient certainty at the time of the sale. The statement as to the number of plates was an estimate. It was not otherwise represented. But the announcement was that the entire catalogue would be sold. There were some missing plates, but Haynes stated they were useless, and it is not shown that his statements were untrue. These missing plates it was understood were not sold. Hall & Son's cata-

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logue, which was announced to be, and which was in fact sold, minus the missing plates, was well known to the music trade, and by the persons attending the sale. I do not see that any information desirable to secure a favorable sale was withheld.

It was stated by Haynes on the sale that the plates aggregated about fifteen thousand ; there might be one or two thousand more or less. The valuable plates and compositions were, however, within a small compass. It turns out that there were over twenty thousand plates in all covered by the mortgage. Haynes had not counted the plates, and did not know the actual number. But the more important statement was, however, made that the whole of the catalogue would be sold except four or five hundred pieces which could not be found, and some plates destroyed by the Boston fire. And in respect to these it was said that they were of little value. The number of subjects was, however, given. The plaintiff was present at the sale, he made no correction of the statements of defendant Haynes. It cannot be said that the persons present at the sale and who well knew the catalogue, were not sufficiently advised of what was to be sold. I think they understood the subject and what was to be sold. The weight of evidence is that they were so advised. The efforts made by Ditson & Co. to secure the attendance at the sale, of the members of the board of music trade in the United States, then in session in New York, certainly was evidence of a desire on their part to secure a good sale of the property. It was evidence of an honest intention.

But as much cannot be said in favor of the plaintiff and the personal representatives of William Hall, deceased. Their efforts were evidently intended to depress and defeat the sale. The statements made by them and the claims interposed through them had the effect to discourage bidding on the property. And if through

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their efforts the property did not bring a fair price, I cannot see how a court of equity should interpose to aid them in setting aside the sale upon the ground that the property sold for less than its value.

Through the character of the notices and claims interposed, no other result could have been anticipated. The plaintiff put forward a claim of his wife to a portion of the property. The defendant, James F. Hall, a brother of plaintiff, interposed a claim of one-half interest in a large share of the copyrights. The executors of William Hall, deceased, objected to the sale, for the reason that they had had no notice thereof, and claimed it to be invalid. And one of the attorneys for the plaintiff who appeared for some other interest, also represented that William M. Tweed had a mortgage of \$6,000 and interest since 1870 upon the property, which would be enforced against any one who should purchase. If the claims thus made were interposed in good faith, the property, I am satisfied, sold for more than it was really worth subject to those claims. If the claims were not *bonâ fide* it was wrong to interpose them.

The effect of the public sale under the chattel mortgages was to extinguish the outstanding equity of redemption (*Chamberlain v. Martin*, 43 *Barb.* 607; *Ballou v. Cunningham*, 60 *Id.* 425; *Huggans v. Fryer*, 1 *Lans.* 276).

The right of the mortgagee to purchase at the sale is recognized in *Olcott v. Tioga R. R. Co.* (27 *N. Y.* 546, 565-7). *Tapen v. Richardson* (3 *Sup'm Ct. [T. & C.]*), appears to be the other way, and holds that a purchase by the mortgagee does not bar the mortgagor's equity of redemption. But that case rests upon *Buffalo Steam Engine Works v. Sun Mutual Ins. Co.* (17 *N. Y.* 403). This latter case, however, as is said by SELDEN, J., in *Olcott v. Tioga R. R. Co.* (*supra*), was disposed of on other grounds. The reasons why a

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mortgagee should be allowed to purchase at such sale are well stated by SELDEN, J. (See also same case, 40 *Barb.* 179).

It appears to me that with respect to the sale we are now considering, it was manifestly the true interest of all concerned that the mortgagees should not have been precluded from purchasing. From the notices and claims interposed by the plaintiff and others above described, and which must have been designed to prevent competition, and prevent a sale, it is evident that the mortgagees only would take the risk of purchasing at any thing approaching a fair price for the property. It would have been unjust in the extreme, that the mortgagees should be compelled to stand still and see the property covered by their mortgages, purchased by others at a trifling sum, and in this way lose all security for their claims. There was not the slightest impediment interposed by the mortgagees or the person conducting the sale, to bidding. Every opportunity was offered to secure a satisfactory sale, and in the end Ditson & Co. were forced to take the property at their bid of \$10,000.

They made every reasonable attempt before the property was struck down to them, by explanation through their attorney and Mr. Haynes, to meet the objections interposed, and break the force of the claims interposed, so as to invite bids, but their efforts were without avail. The notices and claims performed their work. Ditson & Co. are not responsible for their effect.

But were it otherwise, and that the equity of redemption has not been extinguished by the sale, yet the mortgagees are in possession and the time for the payment of the mortgages has long since expired. The legal title in the mortgagees is complete by the terms of the instruments. In order to redeem, the mortgagor must pay or tender the whole debt. Such payment or tender must be made or offered in good

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faith before suit brought (*Stoddard v. Denison*, 2 *Sweeney*, 54; *Halstead v. Swartz*, 46 *How. Pr.* 291).

To enforce his equity the plaintiff must do or offer to do equity, and that in an effective way. It is doubtful whether this action, judged by the allegations in the complaint, is strictly an action to redeem. But if it be regarded as such, the failure to have made any tender before suit brought is not satisfactorily excused. The complaint does ask for an accounting, but the facts of the case do not satisfactorily show that in order to place himself in an attitude to ask for equitable relief such accounting is necessary. The plaintiff was himself in possession of facts sufficient to enable him to make a tender before suit brought, if it was his design to redeem the property.

Nor do I think that this action can be maintained for an accounting. The evidence shows substantially that the items of profit to be distributed under the printing contract were known when any amount of printing was done, and that Hall & Son were advised thereof at the time.

And again, in December, 1876, Ditson & Co. and the plaintiff went over the accounts and agreed upon a balance. This was upon an occasion when all the matters between them were the subject of discussion preparatory to a contemplated settlement. The amount due on the mortgages was reached as were the credits in favor of Hall & Son from all sources. No errors are stated in the complaint with regard to the result then reached, nor do any in fact now appear. The amount of indebtedness in favor of Ditson & Co. was presumably correct. In an agreement made December 29, 1876, between Thomas J. Hall, the plaintiff, and Ditson & Co., the amount of their claim is stated at \$21,000. This was after the examination of the accounts made by the parties.

Under such circumstances, and in view of the fact

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that Ditson & Co. on the trial offered to relinquish their entire claim for a deficiency amounting to eleven thousand dollars and upwards, I cannot think the action should be retained for such purpose.

Nor do I think that the action should be held to try the title of the defendant James F. Hall to any portion of the property. That is a question between James F. Hall and Ditson & Co., to be determined in an appropriate action in their behalf.

As the plaintiff is not found to have any just ground or cause for equitable relief, the action cannot properly dispose of rights between the co-defendants not related to the cause of action disclosed in the complaint. If the defendant James F. Hall has any claim to the property through a title superior to that of the mortgagors, he must assert it in an independent action brought for the purpose of enforcing his claims and rights. These rights are not involved in the question whether the plaintiff may redeem by paying the mortgages, or whether the sale should be set aside for the reasons stated, or whether the plaintiff should have an account. And a result being reached adverse to the plaintiff's claim, the complaint must be dismissed with costs, without prejudice to the right of James F. Hall to take and maintain any action in the premises he may deem advisable to assert any right or claim he may have to the property, or any part thereof. And it may be that it was too late after a sale under a chattel mortgage, by which the equity of redemption of the mortgagor has been extinguished, to raise the question of usury in the original transaction, and especially in the manner in which it is interposed herein by a defendant against the claims of a co-defendant. But I deemed it advisable to disregard the objection, and to consider that question in consideration with the subject to which it is in a measure kindred, although

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not disclosed by the complaint, nor a part of the plaintiff's cause of action.

The complaint of the plaintiff is dismissed, as is that of the co-defendants of Ditson & Co. against them. The defendant will recover costs against the plaintiff, but not as to his co-defendants.

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N. Y. Court of Appeals ; October, 1878.

[Reversing 12 *Hun*, 206.]

EXECUTORS AND ADMINISTRATORS.—JURISDICTION OF SURROGATE.—
DISPUTED CLAIMS.—LEGACY TO CREDITOR.—AUDITOR.—RE-
VIEW OF RULINGS OF.—OBJECTIONS TO EXECUTOR'S
ACCOUNTS.—PROOF OF PAYMENTS BY EXECU-
TORS ON FINAL ACCOUNTING.

The surrogate has jurisdiction, on an accounting by an executor or administrator, to try and determine the validity of a claim made by him against the estate.*

If the claim is merely to a right of retainer out of the fund, it makes no difference that it is of an equitable rather than of a common law nature.

A claim to the proceeds of securities collected is a cause of action of a legal nature, although the facts are such that but for the collection of the securities, the only remedy would have been in equity.

Money kept by the husband at his wife's request,—*Held*, a deposit, not a loan, and, therefore, the statute of limitations did not attach until after demand.†

* Though not of one made by any other person, and rejected by the executor. *Tucker v. Tucker*, 4 *Abb. Ct. App. Dec.* 428. Where the claim was in judgment of a court of competent jurisdiction, the rule was applied, not to preclude the surrogate from allowing it, but to preclude him from trying the objections to the judgment, thus holding it conclusive on him. *Stilwell v. Carpenter*, 2 *Abb. New Cas.* 242, 269.

† This rule is embodied in the *Code of Civ. Pro.* § 410.

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A legacy by a husband to his wife in a will containing a direction to pay his debts, is not presumptively satisfaction of her claim for money deposited with him.*

Whether the rulings of an auditor are reviewable on appeal from the surrogate's decree,—*query*,

Such rulings are not so reviewable upon a mere exception noted in the minutes of testimony. There should be an exception filed on the ground of the objection, and determination of the surrogate had on it.

The contestants' objections presented to the surrogate before reference to an auditor, should put in issue the fact of payment, if that is to be questioned before the auditor.

An objection filed to an account of an executor or administrator, that he had allowed more than was actually due to a creditor, does not avail to enable the contestants to object, for the first time, in the appellate court, that he had not actually paid the amount allowed.

Hence, the auditor may exclude evidence on the question of payment, even by examination of the accounting party, unless the contestants obtain leave from the surrogate to amend or file further objections.

The auditor does not decide as a court, but is employed simply to aid the surrogate, and is subject to his directions.

The accounting party is not bound to establish payments which he verifies by oath and produces vouchers for, unless they are denied by objections, and the burden of proof is then on the contestants.

Appeal by defendant, Mary Flint, the executrix of David Flint, from a judgment of the general term of the supreme court, reversing a decree of the surrogate of Erie county.

On the accounting before the surrogate, the executrix, the widow of the testator, presented a claim against the estate in her own behalf, amounting to \$800, with interest from April 15, 1859, for moneys alleged to have been placed in the hands of the testator, on deposit for her. She also claimed to be credited in her account as executrix, with the sum of \$1,756.60, alleged to have been paid by her in full of a promissory

* As to extrinsic evidence on the question,—see *Phillips v. McCoombs*, 53 *N. Y.* 494, overruling in part, *Williams v. Crary*, 5 *Cow.* 368; 8 *Id.* 246; 4 *Wend.* 443; *Hall v. Hill*, 1 *Dru. & War.* 115.

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note of the testator, held, at the time of his death, by Mary Brown, her mother. These claims were allowed by the surrogate, after having been contested by John N. Boughton, the executor, and the other parties. The claim for the deposit of \$800 was heard before the surrogate; that for the payment to her mother was referred by the surrogate to an auditor, who reported in favor of the executrix, and his report was confirmed by the surrogate.

From the decree of the surrogate an appeal was taken by the plaintiffs to the general term of the supreme court, which reversed the decree and remitted the proceedings to the surrogate.

From this judgment of the general term, the defendant appealed to the court of appeals.

Spencer Clinton and Jacob Stern, for appellants.

Thomas L. Cortell and L. P. Perkins, for respondent.

RAPALLO, J.—The general term erred in holding that the surrogate had no jurisdiction to try and determine the disputed claims of the executrix against the estate. We have held in two recent cases that the statute, 2 R. S. 88, § 33, confers that power (*Kyle v. Kyle*, 67 N. Y. 400, 408; *Shakespeare v. Markham*, not reported).

On this question of jurisdiction the appellant makes the further point that the claim of the executrix for \$800, held on deposit for her by the testator, was one cognizable only in equity, and that, conceding that a surrogate has jurisdiction to decide upon disputed claims of an executrix, such jurisdiction extends only to such claims as are enforceable in courts of law, and not to such as require the interposition of a court of equity, a surrogate having none of the powers of courts of chancery.

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If the claim of the executrix were to equitable relief of any kind, there would be force in this objection, but where she claims only the right to retain out of the assets of the estate a sum of money as belonging or due to her, it can make little difference whether her right to it depends upon legal or equitable principles.

In the present case, however, we do not think that any difficulty of this kind arises. The sum which she claimed was the proceeds of certain notes and a bond and mortgage, which had been taken for the purchase money on a sale of real estate belonging to her. The bond and mortgage had been taken by the testator in his own name, but all the money secured by these different instruments had been collected by the testator in his life-time and he recognized the right of his wife to the fund, after it had been received by him; the evidence shows that he offered to pay it over to her and she requested him to keep it for her until she should call for it, to which it appears he assented.

On these facts, aside from the question of coverture, an indebtedness existed which could have been enforced at common law against the testator in an action for money had and received. Had the notes and mortgage at the time of the testator's death remained uncollected and standing in the name of the testator, and the wife had sought to have them transferred into her individual name, the question suggested by the respondents' point would have arisen, but as the case is now presented it does not arise.

In regard to this item of \$800 the respondents further urge that it was barred by the statute of limitations. More than six years had elapsed from the time of the receipts of the money by the testator to the time of his death; but there was no evidence that the money had even been demanded of him, or that he had refused to pay it over, or laid any claim to it hostile to that of his wife. We think that the transaction

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amounted to a simple deposit, upon which the statute would not begin to run until a demand and refusal to pay, or some equivalent act. The money was not loaned to the testator at his request, but was being kept by him for his wife at her request, and he was not in default in not paying it over until she should demand it, as he was requested to keep it until then (*Payne v. Gardiner*, 29 *N. Y.* 146, 167; *Downes v. Phoenix Bank*, 6 *Hill*, 297). For the same reason he was not chargeable with interest thereon without a special agreement.

The respondents further claim that the testator having in his will bequeathed to his wife the sum of \$1,000, this bequest must be deemed to be in satisfaction of the debt which he owed her. There is nothing in the case to justify any inference that such was the intention of the testator. On the contrary, the terms of the will are that after the payment of all his debts he gives certain legacies out of the remainder of his estate, and among them a legacy of \$1,000 and certain furniture and effects to his wife, and these bequests are to be received and accepted by her in lieu of dower. A legacy to a creditor is not to be deemed in satisfaction of his claim unless so intended by the testator (*Williams v. Crary*, 4 *Wend.* 444). A direction to pay all debts negatives such an intention (*Fort v. Gooding*, 9 *Barb.* 371). The point now taken does not appear to have been taken before the surrogate, or at general term, unless it be in connection with the application to re-open the case to let in extrinsic proof on that subject; such an application is to the discretion and favor of the surrogate, and not reviewable unless under very special circumstances, if at all.

It is further objected that by the decree the surrogate has allowed to the executrix, for the amount due on her claim—\$800 and interest—the sum of \$1,056.80. The claim of the executrix was for \$800, with interest

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from 1859. There being no evidence of any agreement to pay interest on this deposit, none was chargeable thereon, at all events during the life of the testator, in the absence of default on his part, and it is evident from the amount that such interest has not been allowed. The surrogate does not in his decree state how he arrives at the aggregate sum allowed, but on reference to the evidence, it is apparent that he intended to allow only the sums actually received by the testator for principal and interest on the notes and mortgage which he collected, and that he has not charged the testator or the estate with interest on these sums. The appellant's land was sold in April, 1859, for \$800—no money was paid down, but three notes of \$100, each payable at one, two and three years, and a mortgage for \$500, payable in annual installments of \$100 each, beginning the fourth year and running on to the ninth, were given, and the whole was on interest. The sum allowed by the surrogate is within a trifle of the sum to which these installments, with the interest, amounted. The mortgage was finally satisfied June 29, 1864. The debtors testify that the satisfaction-piece was given on the day the last payment was made; that all the payments were made to the testator; and and none of it went to the wife, to their knowledge. The estate was clearly chargeable with the interest as well as the principal received by the testator. If the surrogate has made any error in the computation it is very trifling, and his attention should have been called to it.

All the objections taken to the \$800 item have been disposed of.

The only other point in the case relates to an item of \$1,756.60, charged by the executrix in her account for a payment to Mary Brown upon a note given her by the testator for \$1,500 and interest for money lent by her to him. To this item the contestants filed an

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Of the sum of \$1,500 and interest allowed to Mary Brown was interest, and should be \$984 with interest from February 1, 1872, and that there was paid to Mary Brown on the principal of her note the sum of \$1,500 and interest, the sum of \$516 with interest from February 1, 1872.

The account of the executrix thus objected to, was referred by the surrogate to an auditor for examination. The executrix, in the hearing before the auditor, produced the paid note which was made by the testator for \$1,500, dated February 24, 1868, payable one year from date to Mary Brown, or bearer, with interest. Payments were indorsed thereon amounting in the aggregate to \$516. The contestants then introduced evidence for the purpose of proving that Mary Brown, who was the mother of the executrix, lived in the testator's family from about the date of the note to the date of his death, which occurred January 20, 1872, and that it was agreed that the interest on this note should be paid by her board. This was controverted, and evidence was introduced on the part of the executrix for the purpose of showing that the board had been settled and paid. On this conflicting evidence the auditor reported that the whole amount of the note, with interest, less the payments indorsed, was due to Mary Brown by the testator at the time of his death, and that the charge in the accounts of the executrix on account of said note was correct. The contestants excepted to this report, but it was confirmed by the surrogate.

We see no reason for interfering with the findings of fact, but a point is specially made as to one of the rulings of the auditor on the hearing before him. The contestants, on the cross-examination of the executrix, asked her whether she had in fact paid to Mrs. Brown the amount charged in her account, also whether she had paid more than \$984 with interest from Feb-

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ruary, 1872. These questions were excluded by the auditor.

Assuming for the moment that rulings of an auditor are reviewable on appeal from a surrogate's decree, it is quite clear that the questions must first be presented to the surrogate and his decision obtained thereon. In this case the question now raised does not appear to have been presented to or passed upon by the surrogate. The auditor's report was excepted to, but the only grounds of exception specified were that he should have found that all the interest on the \$1,500 note had been paid in addition to the payments indorsed, and that there was due on February 1, 1872, only \$984. That he should have found that the item of \$1,756.60 in the executrix's account should have been \$984 and interest from February 1, 1872; and that he omitted to find that Mary Brown was indebted to the estate for her board, &c. There is no exception filed on the ground that the auditor refused to hear material testimony. The mere noting of an exception in the minutes of the testimony is not, I apprehend, the mode of bringing such questions before the surrogate. Exceptions should be filed to the auditor's report (*Dayton on Surrogates*, 517 [3 Ed.]).

But, passing these considerations, it does not appear to us that there was any error in the ruling of the auditor. His duty was to pass upon the objections filed to the accounts, and no others. If others were to be introduced the contestants should have filed them before the surrogate, and obtained an order referring them to the auditor. The objections which were filed did not raise the question whether the executrix had paid the sum charged in her account. That payment was verified by her affidavit, corroborated by the production of the paid note as a voucher, on the face of which there was due the sum charged in the account. The objection filed was that she had allowed

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the debt for more than was actually due ; not that she had not paid the sum allowed. It says, in substance, that the item allowed is incorrect and should be \$984 with interest, because there had been paid to Mary Brown all the interest and \$516 on account of principal. This objection does not put in issue the fact of payment by the executrix, nor her right to credit for the sum charged by her as paid, provided it was actually due to Mary Brown on the note. The accounting party is not bound to establish payments for which she presents vouchers unless they are denied by objections, and the burden of impeaching such payments is on the contestants. If the objections filed are insufficient, the surrogate may allow further objections to be filed from time to time, but this is not within the power of an auditor.

We think the proper course, if the contestants deemed the questions important, was to apply to the surrogate for leave to amend or add to the objections, or for direction to the auditor to take the proofs offered, and not by appeal to the supreme court to review the rulings of the auditor. The auditor does not decide as a court, but is employed simply to aid the surrogate, and is subject to his directions. The auditor's report amounts to nothing until confirmed by the surrogate (2 R. S. 94, § 64). The decisions of the surrogate only are reviewable on appeal.

We think the evidence warranted the conclusions of the surrogate, and that there is no error in his decree.

The order of the general term should be reversed, and the decree of the surrogate affirmed. The appellant's costs to be paid out of the estate.

All the judges concurred, except MILLER and EARL, JJ., absent.

Matter of Marx.

MATTER OF MARX.

*Surrogate's Court, City and County of New York;
October, 1878.*

ACCOUNTING OF ADMINISTRATOR. — ALLOWANCES. — PARENT AND CHILD. — SUPPORT OF CHILD BY PARENT.

A father is not obliged to support his minor children where they have property that may be applied for that purpose.

Where one who had been appointed administrator of his wife's estate, applied money of the estate in good faith to the support of their children,—*Held*, that the amount should be allowed to the administrator on a final accounting.

Motion for allowances on confirmation, by surrogate, of an auditor's report.

Emanuel Marx was appointed administrator of the estate of his wife, Celia Marx, and after he had served about a year, was removed, and Mayer Southeimer appointed in his place.

Upon the accounting of the former, the latter filed objections to the account, and a reference was ordered. By the referee's report, which appeared to have been confirmed by default, it appeared that the removed administrator had used some of the assets in the support and maintenance of the children, who were entitled to a portion of the estate, although he had not been appointed their guardian; and for that reason the expenditure was disallowed by the auditor, and also because he was the father of said children and was legally bound to support them.

This motion was made for allowances to be fixed on a presentation of a decree entered on a formal confirmation of the auditor's report, and to charge the administrator personally with such allowances and the expenses of the accounting, on the ground, among other things, that he was unsuccessful on his account-

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ing, and had left the State to avoid the performance of the decree.

Phillip Bottman (*Bottman, Roesch & Shaefer*, attorneys), for the motion. ⁴

Adolphus D. Pape, opposed.

CALVIN, Surrogate.—[After stating the facts.]—This finding is upon an extreme technicality, and as to the last named obligation, it is a mistake to suppose that a parent is under obligation to support his minor children where they have property that may be applied for that purpose; and while this is not a review of the auditor's report, I am of the opinion that its terms may properly be considered as to the propriety of charging the administrator personally with the expenses of his accounting, and that he is shown not to have acted in bad faith, and that considerable of the money expended by him for the support of the children, disallowed by the auditor, was in good faith devoted to their support. I am, therefore, of the opinion that whatever expenses have been incurred, and allowances shall be made to the present administrator's counsel on this accounting, should be charged to and paid by the estate.

McNAUGHTON v. CHAVE.

*N. Y. Supreme Court, First Department; Circuit,
December, 1876.*

SIGNING OF FINDINGS OF FACT AND CONCLUSIONS OF LAW.—SURROGATE'S DECREE.—SURROGATE'S CLERK.—FINAL ACCOUNTING.—

POWER OF SURROGATE TO COMPLETE PREDECESSOR'S WORK.

In courts of record having equity jurisdiction, findings of fact and conclusions of law must be signed by the justice who tried the cause.

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In the surrogate's court the decree is signed by the surrogate, and entered in the minutes which he is directed to keep.

By the statute in respect to the surrogate's court in New York city, the actual signature of the surrogate is required to all papers of any importance.

Where a paper, which was claimed to be the decree of a surrogate, was not signed by him, and there was no evidence of its entry in the minutes nor any record of the proceedings, but it was indorsed "filed," by a clerk, without any written or even verbal authority from the surrogate,—*Held*, that it was not a valid decree.

A surrogate's clerk cannot file an unsigned decree, or otherwise make it valid.

Where a final accounting of an administrator with the will annexed was had during the term of a surrogate, and the auditor's report was filed before he went out of office, but the decree thereupon was signed by a following surrogate, but not the immediate successor of the one before whom the accounting was had,—*Held*, that the decree was invalid.

The power of a surrogate to complete the work of his predecessor, is limited to the unfinished records of wills, proofs and examinations, and of letters testamentary, of administration and guardianship.

Trial at circuit before a judge without a jury.

This action was brought by Mary McNaughton against William G. Chave, sole surviving administrator with the will annexed of James Espie, deceased, and John L. Russell, Joseph T. Brown and Tabitha C. Smith, sureties on the bond of the said administrator.

The foundation of the action was what was claimed to be a decree upon a final accounting before Surrogate ROBERT C. HUTCHINGS, in December, 1875, the last month in office of the said surrogate. The paper purporting to be the decree upon this accounting, was not signed, seen, or directed to be filed by said surrogate, but it appeared to have been indorsed "filed," by Stephen D. Van Schaick, Esq., who at that time was the chief clerk in the said surrogate's office, and was also auditor to whom the accounts of said William G. Chave had been referred, and who succeeded said

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HUTCHINGS as surrogate. But there was no evidence to show by what authority he so marked the paper.

All the proceedings in said final accounting, up to the time when the aforesaid decree purported to have been made, were had before said Surrogate HUTCHINGS. This said decree was never signed by any surrogate until June 26, 1876, when Hon. DELANO C. CALVIN, then surrogate of New York county, signed it, and made a memorandum thereupon of the date of his signature.

The counsel for the defendant, Joseph T. Brown, one of the sureties, claimed that this paper was no decree, inasmuch as it appeared that the accounting was had during the term of Surrogate HUTCHINGS, and the auditor's report was filed before he went out of office, but the paper was signed by Surrogate CALVIN.

The case of Jennette E. Begg against the same defendants was decided at the same time, and the following opinion applied to both.

Culver & Wright, for plaintiff.

Thomas H. Hubbard (*Butler, Stillman & Hubbard*, attorneys), for defendant, Joseph T. Brown, cited: As to powers of surrogates: *Brick's estate*, 15 *Abb. Pr.* 12, 15, 16, 28, 30, 31, 32, 33; 1 *R. S.* 96, 101 (5th Ed.) pp. 379, 383; 2 *Id.* 52, 58, 71, § 7. As to auditors: 2 *R. S.* p. 94, §§ 64, 65; *Id.* 221; *Id.* part 3, ch. 1; *Id.* 608; 1 *Id.* (6th Ed.) p. 396, and 3 *Id.* 61, *et seq.* and 325, *et seq.* As to the necessity of the decree being signed by the surrogate before whom accounting is had: *Monro's estate*, 15 *Abb. Pr.* 366; 1 *L.* 1870, p. 156, c. 74; *L.* 1874, p. 602, c. 456.

BARRETT, J.—In courts of record having equity jurisdiction, findings of fact and conclusions of law must be signed by the justice who tried the case.

The decree is thereupon entered on his *flat*. In the

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surrogate's court the decree is signed by the surrogate, and entered in the minutes which he is directed to keep (2 *R. S.* 221, § 7, subd. 4; *Laws* 1837, ch. 460, § 21). In the act with respect to the surrogate's court in New York city, the minutes of the surrogate are expressly recognized (*Laws* 1870, ch. 359, § 11), and authority is given to make and enter all lawful orders and decrees (*Laws* 1870, ch. 359, § 1).

In the case of Munro's estate (15 *Abb. Pr.* 366), the surrogate said that the practice with respect to signing decrees had "been long and surely settled. The original decree is the paper signed by the presiding officer of this court, written out in a sheet or sheets of paper. The record or minutes kept in pursuance of the provision of the revised statutes (3 *R. S.* [5th Ed.] p. 365, § 13, subd. 4), is the enrollment of the decree, which should conform to the original decree."

The statute evidently contemplates the actual signature of the surrogate to all papers of any importance.

The record of probate "shall be signed and certified by him" (2 *R. S.* 57, § 10). Every will so proved shall have a certificate of such proof indorsed thereon, signed by the surrogate, and attested by his seal of office (2 *R. S.* 57, § 11). Letters testamentary, or of administration, or to a collector, shall be signed and sealed by him (2 *R. S.* 80, § 55). He shall indorse the discharge of any decree on the margin of the record thereof (*Laws* 1867, ch. 782, § 9). Other instances might be added. In the present cases, the decrees were not signed by Surrogate HUTCHINGS, nor is there any evidence of their entry. The minutes were not produced, nor was any record of the proceedings. There was not even an exemplification under 2 *R. S.* 221, § 6. The plaintiffs simply rely upon an unsigned piece of paper, which without (so far as appears from the evidence) any authority from the surrogate, writ-

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ten or even verbal, was indorsed "filed" by a clerk. It is provided (2 *R. S.* 360, § 11) that no judgment shall be deemed valid so as to authorize any proceedings thereon, until the record thereof shall have been signed and filed. In *Goelet v. Spofford*, 55 *N. Y.* 647, it was held that this provision does not apply to judgment rolls made up under section 281 of the code.

On the other hand, the latter section is inapplicable to surrogates' courts. But whether this section of the revised statutes is controlling or not, there can be no doubt that it is a strong legislative expression as to the invalidity of an unsigned judgment.

The act of the clerk was entirely unauthorized. There is no proof that such clerk was, in writing, designated by an order of the surrogate duly filed and recorded (*Laws* 1863, ch. 362, § 9). Even if such proof had been furnished, there is nothing in the act of 1863, much less in that of 1874 (ch. 456), authorizing him to file an unsigned decree, or otherwise validating it.

Nor was the matter helped by the signature of Surrogate CALVIN. If the plaintiffs rely thereon as effecting an independent decree, the answer is that it was subsequent to the assignment of the bond and the commencement of this suit. If as completing the work of his predecessor, the answer is that there is no evidence that his predecessor ever had anything to do with it. But apart from that, chapter 9 of the *Laws of 1874* plainly limits this power of completion to the unfinished records of wills, proofs and examinations, and of letters testamentary, administration and guardianship.

The complaints must be dismissed with costs.*

There was no appeal.

* After this decision the matter was brought up before Surrogate CALVIN. See *Matter of Estate of James Espie*, 2 *Redfield*, 445.

Cashman v. Henry.

CASHMAN v. HENRY.

Court of Appeals ; November, 1878.

MARRIED WOMAN'S CONTRACT.

A married woman, as incident to her right to acquire property by purchase, may purchase property as her separate estate, upon credit, and bind herself by an executory contract to pay the consideration money.

Her bond, note or other engagement given or entered into to secure such payment, may be enforced against her as if she were unmarried.

Her liability upon such contract does not depend on her possession of an antecedent separate estate,* or on the question whether the contract was prudent and advantageous, or on any special circumstances, but is governed by the ordinary rules which determine the liability of persons *sui juris* upon their contracts.†

Where a grantor of an equity of redemption in mortgaged premises is not personally liable to pay the mortgage debt, his grantee incurs no liability to the holder of the mortgage by a covenant to assume it contained in the deed.‡

S., the owner of mortgaged premises, conveyed them to C., a married

* S. P., *Frecking v. Rolland*, 53 N. Y. 422; rev'g 33 Super. Ct. (J. & S.) 499; *Dingens v. Clancy*, 67 Barb. 566; *Harrington v. Robertson*, Ct. App., Nov. 1877. *Contra*, *Carpenter v. Tatro*, 36 Wis. 297. For other recent cases, see *Williams v. King*, 43 Conn. 569; *Bowser v. Bowser*, 82 Penn. St. 57; *Wallace v. Finbergh*, 46 Tex. 85; *Peters v. Clements*, Id. 114; *Lippincott v. Mitchell*, 94 U. S. (4 Otto) 767.

† See further, *Nash v. Mitchell*, 3 Abb. N. C. 171.

‡ For the principles on which the liability of one assuming a mortgage depends, and the form of the covenant and its various consequences,—see *Binsse v. Paige*, 1 Abb. Ct. App. Dec. 138; *Collins v. Rowe*, 1 Abb. N. C. 98, 101; *Barthet v. Elias*, 2 Id. 864.

As to discharge. *Russell v. Weinberg*, 4 Abb. N. C. 139; 2 Id. 422; *Devlin v. Murphy*, p. 242 of this volume; *Ranney v. McMullan*, p. 246.

Covenant or estoppel to deny liability of mortgagor. *Thayer v. Marsh*, 11 Hun, 501.

See also *Fairchild v. Lynch*, 42 Super. Ct. (J. & S.) 265; *Kohner v. Higgins*, Id. 4; *Morse v. Brockett*, 67 Barb. 284; *Meyer v. Lathrop*, 10 Hun, 66.

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woman, by a deed containing the usual clause by which a grantee assumes a mortgage. C. conveyed the premises to H. by a deed containing a similar assumption clause. In an action to foreclose the mortgage,—*Held*, that C., upon accepting her deed, became liable personally to pay the mortgage, and that, therefore, H. was liable for a deficiency upon a sale in foreclosure.

Appeal by plaintiff from a judgment of the general term of the superior court of the city of New York, affirming a portion of a judgment entered at special term in an action to foreclose a mortgage. The part of the judgment appealed from held that the defendants, Henry and others, were not liable for a deficiency upon the sale.

In 1872, Samuel Simon executed to plaintiff a bond for \$20,000 secured by the mortgage in suit. In 1873, Simon executed and delivered to Kate M. Cormac, a married woman, a deed of the premises mortgaged, containing an assumption clause in the usual form, reciting that the premises were conveyed subject to said mortgage, which the party of the second part assumed and agreed to pay. In 1874, Mrs. Cormac and her husband executed and delivered to the defendants, Henry and others, a similar deed of said premises, containing a similar assumption clause. In the complaint judgment for deficiency was demanded against the last grantees, Henry, and others. They defended, admitting the validity of the mortgage, but denying any personal liability for the mortgage debt. On this issue the court at special term found for the defendants. An ordinary judgment for foreclosure was entered, containing, however, a provision exonerating defendants from personal liability. The plaintiff appealed from this portion of the judgment to the general term, and from its judgment of affirmance to this court.

The plaintiff offered no evidence except the bond and mortgage, and the deeds from Simon to Cormac and from Cormac to Henry.

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Jacob F. Miller, for appellant.—Mrs. Cormac, by accepting the deed from Simon, became personally liable for the mortgage debt (*Laws of 1848, 1860, 1862*; *Ballin v. Dillaye*, 37 *N. Y.* 35; *Huyler's Executors v. Atwood*, 26 *N. J. Eq.* 504; S. C., 28 *Id.* 275; *Flynn v. Powers*, 36 *How. Pr.* 289; *Walsh v. Powers*, 43 *N. Y.* 26; *Vrooman v. Turner*, 15 *Sup'm Ct.* 79; *Owen v. Crawley*, 36 *N. Y.* 604; *Fowler v. Seaman*, 40 *Id.* 593; *Corn Ex. Ins. Co. v. Babcock*, 42 *Id.* 614; *Frecking v. Rolland*, 53 *Id.* 425; *Bodeen v. Killeen*, *Id.* 93; *Maxon v. Scott*, 55 *Id.* 251).

George C. Holt, for respondents.—The defendants are not liable for a deficiency unless their grantor was liable (*Vrooman v. Turner*, 69 *N. Y.* 280). Their grantor was not liable, because she was a married woman (*Yale v. Dederer*, 18 *N. Y.* 265; 22 *Id.* 450; 68 *Id.* 329; *Co. Litt.* 3 a; *Manhattan Life Ins. Co. v. Glover*, 14 *Hun*, 153; *Brown v. Hennan*, 14 *Abb. Pr.* 394; *Kidd v. Conway*, 65 *Barb.* 158; *Ledeliey v. Powers*, 39 *Id.* 555; *Knapp v. Smith*, 27 *N. Y.* 279; *Nash v. Mitchell*, 3 *Abb. N. C.* 177; *Hallock v. Delmain*, 2 *Sup'm Ct.* [*T. & C.*] 350).

ANDREWS, J.—This court, in *Vrooman v. Turner*, 69 *N. Y.* 280,* affirmed the doctrine of *King v. Whiteley*, 10 *Paige*, 465,—that where a grantor of an equity of redemption in mortgaged premises is not personally liable to pay the mortgage debt, and has no legal or equitable interest in such payment, except so far as the mortgage may be a charge upon the lands mortgaged, his grantee thereof incurs no liability to the holder of the mortgage by reason of a covenant on his part, contained in the deed, to assume and pay the mortgage. The grounds of this doctrine are fully stated in the opinion in the cases cited, and need not be here adverted to.

* Reversing, on this point, 8 *Hun*, 78.

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The defendants claim the benefit of the rule ; and they were, by the judgment of the court below, exonerated from liability for the deficiency arising on the foreclosure sale in this action, on the ground that Mrs. Cormac, their grantor, was not personally bound or liable to pay the plaintiff's mortgage. The mortgage was executed to the plaintiff, in 1872, by one Simon, to secure the payment of his bond for \$20,000. In 1873, Simon, the owner of the equity of redemption in the mortgaged premises, conveyed them by deed to Kate M. Cormac, a married woman, for the consideration, as expressed in the deed, of \$31,000, subject to the mortgage, which the grantee, by the terms of the deed, assumed and agreed to pay as a part of the consideration of the conveyance.

In 1874, Mrs. Cormac, together with her husband, deeded the premises to the defendants, subject to the mortgage, which they in turn assumed and agreed to pay.

It was not shown upon the trial that Mrs. Cormac, when she purchased the land, had any separate estate, or that she was engaged in any trade or business on her own account, or otherwise. The purchase comprised four city lots ; but it does not appear for what purpose they were bought, whether for use or re-sale. The finding of the court that Mrs. Cormac was not personally liable to pay the plaintiff's mortgage, notwithstanding her express agreement, contained in the conveyance from Simon, was put upon the ground that a married woman has no general capacity under the acts of 1848, 1849, 1860 and 1862, to bind herself by a contract to pay the purchase price of land bought by, and conveyed to her, and that her common-law disability attaches to and makes her contract void, unless it appears that the purchase was made, and the liability incurred, in the prosecution of a trade or business, carried on by her on her separate account, and that to

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charge her estate in equity for the debt, there must have been an antecedent separate estate capable of being charged, and the intention to charge it expressed in the contract, or the consideration must be one going to the direct benefit of such estate.

The question presented is one of considerable importance, and not free from difficulty. The case of *Yale v. Dederer*, 18 *N. Y.* 265; 22 *Id.* 450, arose under the acts of 1848 and 1849, and it was determined in that case that the statutes then under consideration did not remove the common-law disability of a married woman to contract debts, or bind herself by a personal obligation, and that her engagements, in any case, could only be enforced by way of equitable charge upon her separate estate, and that such charge could only be created by an intention declared in the contract, which is the foundation of the charge, or when the contract was for the direct benefit of her estate. and it was held that her estate was not charged by the execution of a promissory note, which she had signed in the ordinary form of such a contract, as surety for her husband. The construction put upon the acts of 1848 and 1849, in *Yale v. Dederer*, has been followed in other cases, and the decision in that case is controlling as to the construction of these statutes, and in respect to cases coming within the same principle.*

It is difficult to hold, in view of the decision in *Yale v. Dederer*, that, under the acts of 1848 and 1849, the contract of a married woman to pay for land purchased by her is valid, either in law or equity, or enforceable against her estate, when she receives no other benefit from the transaction than the benefit implied from the acquisition of the title to the land purchased, at least when the land purchased constitutes her entire estate.

* The decision in *Yale v. Dederer* was reiterated on a third appeal. Reported in 68 *N. Y.* 329.

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This view of these statutes does not, however, involve the injustice of allowing a married woman to obtain the title to land upon a promise to pay the purchase price, and then to hold it free from any claim or lien for the purchase-money. Upon the well-settled doctrine of equity, if her bond, or other security for the payment of the consideration is void, the land would be subjected, upon principles quite independent of any doctrine appertaining to the separate estates of married women, to a lien in favor of the vendor, for the unpaid purchase-money. The act of 1848, as amended in 1849, so far as it authorized a married woman to take by gift or grant from any person other than her husband, real or personal property, was not an enabling statute. This capacity she had at common law (*Darby v. Callaghan*, 16 *N. Y.* 71; *Knapp v. Smith*, 27 *Id.* 278). The new capacity given to a married woman by that act, was to hold the estate or property acquired by her in any of the modes designated therein, as her separate property, without the creation of a trust, or the intervention of trustees, free from the control or power of disposition of the husband, with the right to convey and devise it as if she were a *feme sole*.

In *Huyler v. Atwood*, 26 *N. J.* 504; S. C., 28 *Id.* 275, a case almost identical in its facts with this, the same question arose as to the liability of the grantees of a married woman, who, in the conveyance to them, had assumed the payment of a mortgage on the land, which she had likewise assumed in the conveyance from her grantor, to pay a deficiency arising on the foreclosure of the mortgage.

Section 3 of the New Jersey statute of 1852, relating to married women, is in nearly the same words as the same section of our statute of 1848, and the court affirmed the liability of the defendants for the deficiency, upon the ground that the covenant of their grantor to assume and pay the mortgage in the con-

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veyance to her was valid, notwithstanding her coverture; and the conclusion as to the validity of her covenant was reached upon the ground that the legislature, by giving to married women the capacity to acquire real estate by grant, impliedly authorized them to enter into a contract of purchase, and to bind themselves to pay the purchase-money.

The limited construction put upon our statute in *Yale v. Dederer* would not probably justify us in adopting, in its full extent, the view of the New Jersey court; but this court, in *Ballin v. Dillaye*, 37 *N. Y.* 35, which arose under the acts of 1848, 1849 and 1860, went very far towards holding a married woman liable on her bond, given on her purchase of land, for the payment of the purchase-money. In that case, the question was, whether the defendant, Mrs. Dillaye, a married woman, was liable on her bond for a deficiency upon a foreclosure of a mortgage executed by her to the plaintiffs. She obtained title to the premises by purchase at a foreclosure sale of a mortgage held by a bank. The plaintiffs, at the time, held a junior mortgage on the same premises, and intended, upon the sale, to bid to the extent of their mortgage. Mrs. Dillaye wished to prevent their bidding. A written agreement was accordingly executed between her and the plaintiffs, by which, in substance, the plaintiffs agreed to advance \$7,000, to clear the title, and not to bid at the sale; and she agreed to recognize their mortgage as valid, and to give them, on her purchasing the premises, her bond and mortgage on part of the premises to secure the payment of their mortgage debt and the \$7,000 advanced.

Pursuant to the agreement, the plaintiffs advanced the money and refrained from bidding, and the defendant bought the premises and executed to them a bond and mortgage covering the advance and the amount of their original mortgage.

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On the trial of the question of Mrs. Dillaye's liability for the deficiency, the plaintiffs offered to prove that at the time of the transaction, she had a separate estate. There was no offer to prove, nor did it appear, that Mrs. Dillaye had any interest in the mortgaged premises prior to her purchase on the foreclosure of the bank mortgage, or that her antecedent separate estate was pledged for the mortgage debt, or had any relation to the mortgaged premises.

The special term rejected the proof offered, and held that the defendant was not liable for the deficiency, and the decision of the special term was affirmed by the general term. This court reversed the judgment, and directed a new trial.

It is a little difficult to ascertain the precise ground upon which the decision in this court proceeded. The court, in reference to the fact that Mrs. Dillaye had a separate estate, say that it was relevant and material, and in view of the offer on the trial to prove the fact, it is assumed in the consideration of the case. But I do not understand that her liability is put upon the ground that she had a separate estate at the time of the purchase; certainly it was not put upon this ground alone. It is not perceived how Mrs. Dillaye's liability at law, or in equity, for the deficiency, could be affected by the fact that she had a separate estate at the time of the transaction, unless it was connected by contract, or otherwise, with the property purchased. But the court seem to hold, that as she, by the purchase on the foreclosure of the bank mortgage, acquired not only the property included in the plaintiff's mortgage, but other lots in addition, the obligation entered into by her was for the benefit of her estate, and that her whole estate was therefore chargeable with the deficiency.

It is claimed on the part of the plaintiff, that the case of *Ballin v. Dillaye* decides in his favor the ques-

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tion now presented. But, without considering whether the circumstances under which the bond in that case was given distinguish it in principle from this, I am of opinion that the covenant of the defendant's grantee to assume and pay the Simon mortgage, was binding and valid, on the ground that under the acts of 1860 and 1862, in connection with the previous acts, a married woman may purchase property on credit, and bind herself by a contract to pay the purchase-money, and that it is not a material circumstance in respect to her liability, whether she had any antecedent separate estate, or whether the contract, on her part, was a prudent, wise and advantageous one.

The act of 1860 greatly enlarged the civil capacity of a *feme covert*, beyond what was conferred by the previous legislation. By section 2 she is empowered to bargain, sell, assign and transfer her separate property, and carry on any trade or business, and perform any labor or services on her sole and separate account. Section 3 authorizes a married woman, possessed of real estate as her separate property, to bargain, sell and convey the same, or to enter into any contract in reference thereto, with the assent, in writing, of her husband, or by the authority of the court, obtained as provided in the section. Section 7 provides that she may sue and be sued in all matters having relation to her separate property, or in relation to property which might thereafter come to her by descent, devise, bequest, or the gift of any person except her husband, in the same manner as if she were *sole*.

Section 8 declares that the husband shall not be bound by any bargain or contract of the wife "in respect to her sole or separate property, or any property which may hereafter come to her by descent, devise, bequest, or the gift of any person except her husband;" or by any bargain or contract entered into by her in or about the carrying on of any trade or busi-

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ness under any statute of the State, or render him or his property in any way liable therefor.

The authority given to a married woman by this statute to carry on any trade or business on her own account, and to have and control her own earnings, whether living with her husband or living separate from him, worked a radical change in the pre-existing law, and it has been held by this court in several cases, that as incident to her authority under this statute to carry on a trade or business, a married woman may enter into any contract in respect thereto. She may purchase real or personal property on credit for the purposes of the trade or business into which she is about to enter, and bind herself by contract of payment, and also by her contracts made in the course of the business in which she engages (*Bodine v. Killeen*, 53 N. Y. 93; *Frecking v. Rolland*, *Id.* 423). In the case last cited it was said: "The power to carry on a separate trade or business includes the power to borrow money and to purchase upon credit, implements, fixtures and real or personal estate necessary or convenient for the purpose of commencing it, as well as the power to contract debts in its prosecution after it has been established."

The limitation upon the power of a married woman to deal with her real estate contained in section 3 of the act of 1860,—which made the assent of her husband or the order of the court necessary to the validity of her conveyance of her lands or her contracts in respect thereto,—was removed by the amendment of 1862, and a clause was added to the section expressly authorizing her to enter into any of the usual covenants for title in her contracts in relation to, or her conveyances of her real property, which covenants the section declares shall be obligatory to bind her separate property.

It will be observed that these statutes confer upon a

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married woman the broadest and most comprehensive powers over her separate real and personal property. Her power of disposition is absolute and unqualified. She may sell or give it away. She may enter into any contract in respect to her separate real property "with the same effect, and in all respects as if she were unmarried," and this court has held that as incident to her separate ownership she is liable for torts committed in its management, and for the fraud of her agent in dealing with third persons in respect to it (*Rowe v. Smith*, 45 *N. Y.* 230; *Baum v. Mullen*, 47 *Id.* 577). She may engage in business and incur the most dangerous, and even ruinous liabilities in its prosecution, and they will be enforced against her to the same extent as if she was unmarried. She is no longer regarded as under the tutelage of the court; but the new legislation assumes that she is capable of managing her own interests.

But it is insisted that she may not bind herself by a contract for the purchase of land if she has no antecedent estate to be benefited, or if the purchase is not made for the purposes of a trade or business. The policy of such special limitation, in view of the general scope of our statutes and the conceded power of married women to charge and dispose of their property, and incur liabilities in its management, is not apparent.

In *Stewart v. Jenkins* (6 *Allen*, 300), the supreme court of Massachusetts, under a statute of that State which provides "that a married woman may bargain, sell and convey her separate real and personal property, enter into any contract in reference to the same, carry on any trade and business and perform any labor and services on her sole and separate account, and sue and be sued in all matters having relation to her separate property, &c., as if she were sole," held that a married woman was bound by a note given as the consideration

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in part of a conveyance of real estate, on the ground that it was a contract in reference to her separate estate within the statute, and the court rejected as too narrow the construction insisted upon by the defendant, that the power given to a married woman by the statute to enter into a contract in reference to her separate estate was limited to the estate owned by her when the contract was made.

The section of the Massachusetts statutes considered in *Stewart v. Jenkins*, is very nearly like section 3 of our statute of 1860, as amended in 1862. But the intention of the legislature to confer upon a married woman the general capacity to enter into a valid executory contract to pay for property purchased by her, is indicated by sections 7 and 8 of the act of 1860, amended in 1862. Section 7 of the act of 1860 was amended by the act of 1862, by inserting the word "purchase" in the first clause of the section, so that it should read, "Any married woman may, while married, sue and be sued in all matters having relation to her sole and separate property, or which may come to her by descent, devise, bequest, purchase, &c.," and section 8 was amended by inserting the same word in that section, so as to embrace in the exemption of the husband, exemption from liability on the contracts of the wife, made in respect to property coming to her by purchase.

These amendments indicate that the legislature had in view the acquisition by a married woman of the title to property by purchase, and the clear implication from the provision in section 8,—exempting the husband from liability upon the wife's contracts or bargains in respect to property purchased by her,—is, that she may bind herself personally by such contracts; and a contract to pay the consideration of land conveyed to her, is, I think, a contract in respect to

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property coming to her by purchase, within the meaning of the statute.

The conclusion is, that under the statutes, as they now exist, a married woman, as incident to her right to acquire real and personal property by purchase, and hold it to her sole and separate use, may purchase property upon credit, and bind herself by an executory contract to pay the consideration money, and that her bond, note or other engagement given and entered into to secure the payment of the purchase price of property acquired and held for her separate use, may be enforced against her in the same manner, and to the same extent as if she were a *feme sole*, and that her liability does not depend upon the proof or existence of special circumstances, but is governed by the ordinary rules which determine the liability of persons *sui juris*, upon their contracts.

The judgment should be reversed and a new trial ordered.

All the judges concurred, except MILLER and EARL, JJ., who did not hear the argument.

Judgment accordingly.

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N. Y. Supreme Court, First Department; Special Term, February, 1878.

AGREEMENT FOR RECONVEYANCE OF LAND.—FORECLOSURE OF MORTGAGE.—RELEASE OF GRANTEE FROM LIABILITY FOR A MORTGAGE.

Where an agreement was made contemporaneous with a conveyance of land, that the grantor would "at any time" thereafter, accept a reconveyance, indemnify the grantee against taxes and assessments paid by him, and release him from the covenants in the deed, which deed contained a covenant by which the grantee assumed the pay-

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ment of a mortgage then existing on the land;—*Held*, 1. That a subsequent reconveyance of the land, and a release of the original grantee by the grantor from the covenant, was valid and effectual to discharge him from all claims under the mortgage. 2. That the fact that the agreement to accept a reconveyance was verbal only, and the time indefinite, could not be taken advantage of by the holder of the mortgage, that being a question between the parties to the conveyance only, which a stranger could not raise.*

Foreclosure of mortgage.

This was an action by William Devlin against Thomas Murphy, William Fullerton and others, for the foreclosure of a mortgage.

The defendant, Murphy, being the owner of certain lands, executed a mortgage thereon to Henry F. Spaulding. He afterwards conveyed the lands to the defendant, Fullerton. The deed to Fullerton contained a covenant by which he assumed the payment of the mortgage. It is sought in this action to hold Fullerton for any deficiency arising on the sale.

At the time of the conveyance to Fullerton, it was agreed by Murphy that he would, "at any time" thereafter, accept a reconveyance of the lots, and reimburse Fullerton for what he had paid out, and release him from all obligations he should assume.

Fullerton afterwards, and after the commencement of this action, reconveyed the land to Murphy, and was released from the mortgage by Murphy.

John E. Devlin, for plaintiff.

E. L. Fancher, for defendant, Fullerton.

* "Where parties have made a contract which will either directly or indirectly benefit a mere stranger, they may at their pleasure abandon it, and mutually release each other from its performance, regardless of his interest, unless the parties, with knowledge that he is relying on the contract, suffer him to put himself in a position from which he cannot retreat without loss in case the contract is not performed." *Crowell v. Currin*, 27 *N. J. Eq.* 152, 650; *Flagg v. Munger*, 5 *Seld.* 483, 495; *Moak's Notes to Crocker's Case*, 17 *Eng.* 765.

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VAN VORST, J.—The defendant, Fullerton, has testified that it was a part of the terms and conditions upon which he became a purchaser of the lands covered by the mortgage sought to be foreclosed in this action, that his grantor, Murphy, would, at “any time thereafter,” accept of a reconveyance of the lots, and reimburse him for what he had paid out, and “reinstate him as he was at first.” In the event of a reconveyance he was to get back principal and interest, all he should pay as consideration, and all disbursements, including taxes and assessments, and he was to be released from all obligations he should assume. This, according to Mr. Fullerton’s testimony, was the “final agreement” when the conveyance was made and accepted.

The defendant, Murphy, corroborates this statement, at least to the extent that he would take back the property whenever Fullerton “got tired of it.”

The deed of Fullerton contains a covenant by which he assumed the payment of a mortgage then existing upon the premises, executed by Murphy to Henry F. Spaulding, and others, for \$2,940, being the mortgage in suit. The conveyance to Fullerton was in the year 1872. By deed, dated April 5, 1877, Fullerton reconveyed the premises to Murphy. This conveyance, which is signed by Murphy, contains, among other things, a release of Fullerton from any obligation he had incurred with respect to the mortgage, through the covenants in the deed, and Murphy himself assumed and agreed to pay it. The agreement between Murphy and Fullerton, in effect, contemporaneous with the deed, was verbal. But it was performed in part, at the time, by the making and acceptance of the original conveyance, and the reconveyance was made and received in further performance of it.

It is objected by the plaintiff that this verbal agreement was invalid. But I apprehend that the question

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of the invalidity of the agreement, and whether or not it should be carried out, rested with Fullerton and Murphy exclusively. Whether or not the agreement was void for indefiniteness as to time, or because not reduced to writing, was for the determination of Murphy. He only could object that a delay of five years in making the reconveyance was unreasonable. If Murphy felt himself bound in conscience to carry out the agreement, and accept a reconveyance after a lapse of five years, and further to do what he could towards reinstating Fullerton, it is not for others, who are neither parties nor privies to the agreement, to complain. There is certainly nothing inequitable in the result reached through the reconveyance, if the intentions and agreements of the parties made in good faith are fully carried out. A stranger to the contract cannot object that the agreement was not in writing (*Dempsey v. Kipp*, 61 *N. Y.* 471), nor that Murphy was not bound to accept a reconveyance. He believed that he was bound, and acted upon such belief; that is sufficient.

It is true that Fullerton's covenant with respect to the payment of the mortgage was to the advantage of the holder of the mortgage, and could have been enforced by him so long as the covenant was in force. But that in itself affords no valid reason why the parties who made the covenant should not carry out an agreement honestly made, contemporaneous with the covenant, although the effect be to discharge the covenant and deprive a third person of an advantage he might secure with the covenant in force.

If the holder of the mortgage obtained any right, it is in subordination, and must yield to the earlier rights and equities of Fullerton, through the original agreement in which the covenant in question originated. *Stephens v. Casbacker* (8 *Hun*, 116) is an authority that Murphy's subsequent release operates as a dis-

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charge of Fullerton from all obligations assumed under the deed to him. And the case under consideration is stronger in its facts for the defendant than *Stephens v. Casbacker*. In that case the subsequent conveyance of the land and the release were not the result of an agreement made contemporaneous with the covenant. The fact that plaintiff's action for the foreclosure of the mortgage was pending when the conveyance was made and the release given, does not affect the question. The commencement of the plaintiff's action could not prevent the parties from carrying out a prior agreement between themselves.

The action may proceed to judgment of foreclosure, but the defendant, Fullerton, is not liable for any deficiency. As between plaintiff and the defendant, Fullerton, neither should recover costs, as, from the condition of the record, the plaintiff was justified in bringing in Fullerton as a party.

No appeal was taken.

RANNEY v. McMULLEN.

N. Y. Superior Court ; Special Term, February, 1878.

FORECLOSURE OF MORTGAGE.—ASSUMPTION OF PAYMENT OF MORTGAGE.—RELEASE OF GRANTEE OF MORTGAGOR.—
PRINCIPAL AND SURETY.

Where it was the intention and there was no mistake of the grantor of a deed in inserting a clause therein by which the grantee assumed the payment of a mortgage, and no fraud or deception was practiced upon him and he was present with counsel at the delivery of the deed,—*Held*, that the grantee was bound to know and was legally chargeable with full notice of the contents of the deed.

A mistake of one of the parties to a deed, in the absence of fraud by the other, does not warrant the court in reforming the instrument.

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Whether a written instrument can be reformed except in a direct suit for that purpose,—*query*.*

In such a suit no amendment will be allowed on the ground of mistake, without the clearest and most satisfactory proof, and unless it appears that the mistake was mutual.

Where, after a conveyance of mortgaged premises by a mortgagor to one who assumed the payment of the mortgage, the former released the latter from his covenant to pay the mortgage,—*Held*, that this did not release the grantee from his liability to the mortgagee.

A conveyance by the mortgagor of mortgaged premises to one who assumes the payment of the mortgage, places the latter in the relation of principal debtor to the mortgagee, and the former in that of surety only.

The liability of such a grantee can be directly enforced in an action without a foreclosure, and without impleading the original obligor and mortgagor.

Foreclosure of a mortgage. Trial by the court.

This was an action by Catherine H. Ranney against David McMullen and others, to foreclose certain mortgages made by John B. Davis to Lafayette Ranney, to secure the sum of \$10,000 each.

The facts of the case are as follows: On July 17, 1874, one John McMullen, a son of the defendant, David McMullen, entered into a contract with said John B. Davis, for an exchange of lands. By its terms McMullen agreed to convey to Davis, a tract of land on the First avenue, in the city of New York, extending from One-hundred-and-twenty-fourth to One-hundred-and-twenty-fifth street, at the price of \$62,000 to be paid as follows: \$35,000 by the assumption of two mortgages for that amount, then on the property; \$24,000 by a conveyance of land in Seventy-fifth street for the price of \$60,000, subject to three first mortgages, amounting in all to \$30,000; the party of the first part, John McMullen, to give back his bond secured by mortgage of said premises for \$6,000; thus leaving an

* Compare *Mandeville v. Reynolds*, 68 N. Y. 529, *aff'd* 5 Hun, 338; *Maher v. Hibernia Ins. Co.*, 67 N. Y. 283, *aff'd* 6 Hun, 253.

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equity of \$24,000. The remaining \$3,000 was to be paid in Davis' bond secured by a second mortgage, on part of the One-hundred-and-twenty-fifth street tract.

The First avenue property really belonged to David McMullen, though standing in the name of his son John, who acted in his stead.

The Seventy-fifth street property had been conveyed to Davis, on February 25, 1874, by Lafayette Ranney, to whom Davis had executed three purchase money mortgages thereon, for \$10,000 each, being the same three mortgages mentioned and referred to in the contract between John McMullen and Davis.

At the instance and upon the request of Davis, Ranney agreed to take from McMullen the title to the First avenue property, and to assume the mortgages thereon, provided David McMullen (and not John) would become the grantee of the property in Seventy-fifth street, and assume the mortgages thereon. Ranney was unwilling to accept of John McMullen's responsibility, but consented to the proposed arrangement, only upon the express condition that David McMullen should take the title to the Seventy-fifth street land, and become personally liable for the mortgages thereon made by Davis to himself. These mortgages had previously, and on or about April 6, 1874, been assigned to, and were held and owned by the present plaintiff, the wife of Lafayette Ranney.

There was some conflict of evidence as to whether or not Ranney's agreement with Davis was to the effect above stated, but the judge before whom the case was tried, found as matter of fact that such was its purport.

On August 1, 1874, by deed dated on that day, John McMullen conveyed to Lafayette Ranney, the First avenue property, subject to two mortgages made by David McMullen, to the Reformed Dutch Church of

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Harlem, for \$35,000, the payment whereof Ranney expressly assumed.

On the same day Davis conveyed to David McMullen the Seventy-fifth street property by deed of concurrent date, the consideration of such deed, as therein expressed, being the sum of \$60,000. Such conveyance was made "subject, however, to three certain mortgages now on the premises which, with the interest, due and to become due, the party of the second part hereby assumes; they amounting to the sum of \$30,000, being part of the consideration money of this conveyance." The deeds of the properties were simultaneously delivered, Davis acting for Ranney in receiving the deed from John McMullen.

The present action was brought by the plaintiff, as assignee, to foreclose two of the mortgages on the Seventy-fifth street property.

The complaint averred, among other things, that in and by the conveyance of August 1, 1874, from Davis and wife to David McMullen, the latter covenanted and agreed to pay the moneys secured by said mortgages, with the interest thereon, and judgment was demanded against him for any deficiency in the proceeds of the sale, to pay the amount due to the plaintiff.

David McMullen answered, setting up the contract between John McMullen and Davis, above stated, and averring that John McMullen did not, in and by said contract, agree to assume payment of the said mortgages, or any part thereof. He further averred that having purchased John McMullen's interest in said contract, he subsequently took from Davis the deed of August 1, 1874, whereby the Seventy-fifth street property was conveyed; that "by mistake of the scrivener or person who prepared the deed" he "was therein made to assume the payment of the said mortgages," but that, when he received the said deed, he did not

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know that it contained any clause making him liable for the payment thereof; that he did not discover the fact until January, 1877, when, by a written instrument under his hand and seal, Davis, for the consideration therein mentioned, released and discharged him from the said provision and covenant.

Upon the trial, Davis and David McMullen were both sworn as witnesses, and testified as to the circumstances under which the respective conveyances to Ranney and to David McMullen were made.

The "scrivener or person who prepared" the deed to McMullen, an attorney and counselor-at-law employed by Davis for the purpose, was not called or examined as a witness; nor was the lawyer of McMullen, who attended on his behalf when the exchange was consummated, and who accepted, recorded, and retained the deed from Davis, produced or examined as a witness on the part of the defense.

Davis testified that he had no recollection of having instructed his lawyer to insert the assumption clause in the deed, and McMullen was positive in the assertion that he neither read the deed nor had any knowledge of the assumption clause contained in it until January, 1877.

Other facts sufficiently appear in the opinion.

Charles Strauss, for plaintiff.—The deed cannot be reformed, except in an action between the grantor and grantee, and not in a collateral action (*Wyche v. Greene*, 11 *Geo.* 173; *Cady v. Potter*, 55 *Barb.* 463; *Casler v. Sitts*, 6 *Hun*, 659; 1 *Story's Eq.* § 165). Equity will interfere and grant relief only where there is a plain mistake, clearly made out by satisfactory proofs (*Gillespie v. Moon*, 2 *Johns. Ch.* 595-597; *Tucker v. Madden*, 44 *Me.* 206; *Lyman v. United States Ins. Co.*, 2 *Johns. Ch.* 630; *Kent v. Manchester*, 29 *Barb.* 595; *Boardman v. Davidson*, 7 *Abb. Pr. N. S.*

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439). The release is void for lack of consideration (Ranney v. Peyser, Sp. T. in fall of 1876, opinion by DONAHUE, J., where it is held that the mortgagor has no power to release his grantor from the covenant of assumption. Also see opinion of MURRAY HOFFMAN, referee*). When the mortgagor conveys the mortgaged premises to one who assumes the payment of the mortgage, such grantee becomes the principal debtor, and the mortgagor surety (Cornell v. Prescott, 2 Barb. 16; Russell v. Pistor, 7 N. Y. 171, 174; Stebbin v. Hall, 20 Barb. 530; Flagg v. Mangin, 9 N. Y. 499; Rubens v. Prindle, 44 Barb. 345; Hartley v. Harrison, 24 N. Y. 171; Garnsey v. Rogers, 47 Id. 233; Thorp v. Keokuk Coal Co., 48 Id. 258). The purchaser who assumes payment of a mortgage is liable to an action for the amount of the mortgage by the mortgagee, without a foreclosure and without joining the mortgagor as co-defendant (Cumberland v. Codrington, 3 Johns. Ch. 255; Barker v. Bucklin, 2 Den. 45; Lawrence v. Fox, 20 N. Y. 268; Burr v. Beers, 24 Id. 178). He is liable, upon his undertaking to pay, and not upon a mere agreement of indemnity (Rawson v. Copland, 2 Sandf. Ch. 251); and the mortgagor is liable only as surety of the purchaser (Marsh v. Pike, 10 Paige, 595; Vanderkemp v. Shelton, 11 Id. 28; Lafarge v. Herter, 11 Barb. 159). When the purchaser has assumed payment, the release of the mortgagor by the creditor from all liability does not exonerate the purchaser from liability (Bentley v. Vanderheyden, 35 N. Y. 677; Garnsey v. Rogers, 47 Id. 242). The mortgagee is entitled to the benefit of the assumption (King v. Whitely, 10 Paige, 465; Russell v. Pistor, 7 N. Y. 171). The grantee accepting a deed containing the assumption clause is liable for any deficiency (Trotter v. Hughes, 12 N. Y. 74; Thorp v. Keokuk Coal Co.,

* See post, p. 259, note.

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47 *Barb.* 439). A trust created for the benefit of a third person, though without his knowledge at the time, may subsequently be adopted by him, and he may enforce its execution (*Berly v. Taylor*, 5 *Hill*, 577). Such a person, although not privy to the consideration for a promise in his favor, may bring an action thereon (*Lawrence v. Fox*, 20 *N. Y.* 268; *Cumberland v. Codrington*, 3 *Johns. Ch.* 255). Defendant is estopped from pleading a mistake by his laches and bad faith (*Thomas v. Bartow*, 48 *N. Y.* 193).

Daniel P. Hays (*Carpentier & Hays*, attorneys).—When a covenant to assume is inserted in a conveyance from the mortgagor, the mortgagee cannot enforce it unless the mortgagor could do so (*Thomas on Mort.* 193, 194; *Flagg v. Munger*, 9 *N. Y.* 483). It is proper for the defendant to interpose the defense of a mistake in the insertion of the assumption clause (*Thomas on Mort.* 194; *Ricard v. Sanderson*, 41 *N. Y.* 179; *Blyer v. Monholland*, 2 *Sandf. Ch.* 478). The release from Davis is sufficient to establish defendant's defense (*Stephens v. Casbacker*, 8 *Hun*, 116).

SANFORD, J.—[After stating the facts.]—Notwithstanding the evidence I cannot doubt, under all the circumstances of the case, and in view of the express and positive testimony of Ranney, that it was purposely inserted in the deed, in pursuance of the arrangement to that effect, made between Davis and himself, and that it formed the consideration and inducement for the acceptance by Ranney, of John McMullen's deed to him, and of his assumption therein of David McMullen's mortgages to the Reformed Dutch Church of Harlem. Ranney testified that the understanding between Davis and himself, that the mortgages were to be assumed on both sides, was explicit and definite, and that, when he received from Davis the deed from John McMullen, and thereby assumed the

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mortgages therein mentioned, Davis informed him that the plaintiff's mortgages had been assumed by David McMullen.

It seems hardly possible, if an understanding thus definite and explicit existed between Ranney and Davis, to the effect that the clause in question should be inserted in Davis' deed to McMullen, that its insertion therein should be owing entirely to inadvertence or to accident or mistake. The clause is wholly in manuscript, and is interpolated between the printed portion of an ordinary blank form ; whoever wrote it there evidently intended to do so, and it would require stronger proof than the absence from Davis' mind of any distinct recollection on the subject to satisfy me that no instructions were given to "the scrivener or other person who prepared the said deed," to have it inserted as an essential feature of the instrument. The deed was prepared and its execution was witnessed and attested by an attorney and counselor-at-law, who must be presumed to have acted with ordinary intelligence and in pursuance of the directions given him by his client. The omission to procure the testimony of that attorney, as well as the testimony of the attorney of McMullen, who acted in his behalf in approving and accepting the deed, is a significant circumstance which cannot be lost sight of in weighing the evidence. The importance of the testimony of McMullen's attorney appears to have been fully appreciated by the defense, since a vain attempt is made to excuse its omission from the record by showing that he is an invalid and paralyzed ; but there is nothing in the evidence to show that it was impossible, or even that it would have been difficult to obtain his deposition, and no attempt was made to explain or account for the absence of the attorney for Davis.

On the whole evidence my conclusion is, that the clause in question was not inserted in the deed by mis-

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take, or otherwise than for the purpose and with the intent of carrying out the express understanding and agreement between Ranney and Davis. If it was intentionally inserted by Davis, and there was no mistake on his part in regard to it, it is wholly immaterial whether David McMullen overlooked it or not. No fraud or deception was practised upon him. He was personally present when the deed was delivered, and was also represented by counsel of his own selection. He was bound to know and was legally chargeable with full notice of the contents of the instrument. Moreover, Ranney, as representing the plaintiff, was really a party to the transaction. David McMullen was dealing directly with him. For the conveyance to Ranney, although nominally executed by John, the son of David, was David's own act and deed. He alone was interested in the transaction. The mortgages assumed by Ranney in accepting that conveyance, were mortgages for which Davis was personally liable, and he was well aware that the mortgages referred to in the deed from Davis to himself, were mortgages to Ranney. He was, therefore, dealing with Ranney as well as with Davis; and as Ranney was accepting and assuming an obligation for his benefit, in consideration of the obligation assumed by him in accepting the deed from Davis, it should be made to appear that it was not intended or designed by Ranney, as well as Davis, that such an obligation should be imposed upon him, in order to enable him to assert that the creation of that obligation was a mere inadvertence or mistake. But, however this may be, I entertain no doubt, and unhesitatingly find as a fact in the case, that the assumption clause in the deed from Davis was intentionally inserted therein by Davis, pursuant to his previous agreement with Ranney that it should be inserted. If so, there was no mistake in the matter, for the correction of which the equitable interposition

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of the court can be invoked. A mistake on one side, in the absence of fraud on the other, does not warrant the court in reforming the instrument (*Pennell v. Wilson*, 2 *Robt.* 505 ; S. C., 2 *Abb. Pr. N. S.* 466).

It may well be doubted whether a written instrument can be reformed except in a direct suit for the purpose ; but, even in such a suit, no amendment will be made or allowed on the ground of mistake, without the clearest and most satisfactory proof, nor unless it appear that the mistake was mutual (*Leavitt v. Palmer*, 3 *N. Y.* 19 ; *Nevius v. Dunlap*, 33 *Id.* 676).

It only remains to determine whether, under the circumstances, the release from Davis to David McMullen operated to discharge the liability incurred by the latter to the plaintiff, when he assumed the mortgages held by her. As already intimated, I am of opinion that, in assuming those mortgages, David McMullen dealt not alone with Davis, his grantor, who was personally liable as mortgagor, but with the plaintiff, as represented by her husband, and that the consideration of such assumption was not merely the grant by Davis, but the assumption by plaintiff's husband of the mortgages on the First avenue property. The transaction was single and entire. If so, it would be most inequitable and unjust to permit David McMullen's liability to the plaintiff, incurred by him upon a consideration moving from her, or from her husband acting in her behalf, to be discharged by the action of Davis, and without her authority or consent. But, irrespective of this consideration, I am of opinion that Davis was incompetent to release or discharge the defendant, McMullen, from his covenant to assume the mortgage. If, for any reason, Davis had not himself been liable for the payment of the mortgages, the assumption clause would have been nugatory and inoperative, and would not have enured to the plaintiff's benefit except upon the theory above suggested of

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her actual participation in the transaction (King v. Whitely, 10 *Paige*, 465; Vrooman v. Turner, 69 *N. Y.* 280; reversing 8 *Hun*, 78). Being liable, his conveyance of the property to the defendant, McMullen, who thereby assumed the payment of the mortgages, placed the latter in the relation of principal debtor to the plaintiff, and thereafter Davis was liable, not as principal debtor, but only as surety.

The liability of McMullen, as principal debtor, to the plaintiff, might have been directly enforced in an action upon the *assumpsit*, without a foreclosure and without impleading Davis, the original obligor and mortgagor (Burr v. Beers, 24 *N. Y.* 178).

In such a case, the release of the mortgagor by the creditor does not operate as a discharge of his grantee, who has assumed the mortgage (Bentley v. Vanderheyden, 35 *N. Y.* 677), and it is difficult to perceive any ground or principal upon which the mortgagor can do more than discharge the liability of the purchaser to himself. As surety of the purchaser, he would be entitled to indemnity from, and recourse against the latter, in case he should himself be compelled to pay. This obligation to himself it would be competent for him to discharge. But if the purchaser, as we have seen, is also primarily liable to another, it would seem that such primary obligation can be discharged only by satisfaction or by release, duly executed by that other. A release of the principal debtor by his surety would be, *quoad* the creditor's rights, *res inter alios acta*.

There is no precedent or authority for the proposition that the liability of a principal debtor can be discharged by the release of his surety or otherwise, than by the act or deed of the creditor himself. The liability of David McMullen as principal debtor to the plaintiff became fixed and absolute when he accepted the conveyances. No one but the plaintiff was competent

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to discharge it. Such was the opinion of MASON, J., as expressed in *Hartley v. Harrison* (24 N. Y. 170). Although the other judges who concurred in the result reached by him disclaimed any intention to pass upon the question, it is clear from the opinion of COMSTOCK, J., dissenting, that the judgment appealed from had not established the liability of the grantee of the mortgagor to pay the mortgage debt upon the covenant implied from his acceptance of a deed declaring that he assumed it; so that the doctrine that such a covenant can be discharged by the mortgagor and grantor, has not even the authority of the supreme court in that case, from whose judgment the appeal to the court of appeals was taken. The statement which precedes the opinion of the court shows that the judgment appealed from merely directed the sale of the mortgaged premises, and imposed no personal liability for a deficiency upon either the mortgagor or his grantee. The defendants and not the plaintiffs in the action appealed.

The case of *Stephens v. Casbacker* (8 Hun, 116), furnishes a precedent in favor of the view contended for by the defense; but the opinion of the court in that case seems to assume that the referee before whom *Hartley v. Harrison* (*as supra*) was tried, held that the release by the mortgagor was a valid discharge of the covenant to assume the mortgage contained in the deed, so far as relates to the grantee's personal liability thereon, and that such decision was affirmed both at the general term of the supreme court, and by the court of appeals. It certainly appears in that case that no judgment for deficiency was rendered against the grantee of the mortgagor. But *non constat* that such judgment was insisted on by the plaintiff; certainly no appeal from the judgment was taken by the plaintiff. He acquiesced in it as it was rendered, and the question whether or not the grantee of the mort-

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gagor was exonerated from personal liability to him, if passed upon by the referee, was never before an appellate tribunal, either in the supreme court or in the court of appeals.

It appears from the reporter's note appended to *Stephens v. Casbacker*, that the case of *Garnsey v. Rogers* (47 N. Y. 242), where the court say, in substance, that the valid assumption of a mortgage, made on an absolute conveyance of land, is "unconditional and irrevocable," was not cited in the points of counsel, and does not appear to have been brought to the attention of the court. Under these circumstances, I cannot regard the case of *Stephens v. Casbacker* as controlling, and, as it seems to me, at variance with the current of opinion expressed in the other cases to which reference has been made, I venture, with great diffidence, to adopt a different conclusion. I do so the less reluctantly, because it appears that there were special equities in favor of the defendant in that particular case, which would seem to have influenced the court, and which, perhaps, affected its judgment. The defendant had relinquished the possession of the land to his grantor after receiving the release. The contract of sale had been virtually rescinded, and the land had been re-conveyed.

In *Garnsey v. Rogers*, the assumption clause was not contained in an absolute deed, but in a mortgage, or defeasible conveyance, and the decision of the court in holding that the satisfaction of the mortgage operated to discharge the covenant of the mortgagee to assume, was founded upon this distinction.

It was held there, in the case of a mortgage or defeasible conveyance, where the grantor reserved to himself the right of annulling it by paying his debt, that when he does so he discharges the agreement of his mortgagee to pay the prior mortgage. "The reservation of this control by the grantor," it was said, "shows that

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the agreement was for his benefit only, and prevents its enuring to the benefit of any third party." It is expressly intimated, however, that if the conveyance be absolute and not defeasible, the grantor cannot retract his conveyance nor the grantee his promise or undertaking."

This exposition of the law applicable to such cases seems to me more in accordance with sound principle than that adopted in *Stephens v. Casbacker*, and therefore, with great deference to the learned court which decided that case, I venture to accept and follow what I deem the better opinion.

It may not be out of place to observe that in the unreported case of *Ranney v. Peyser*, decided at special term of the supreme court in the first department in the fall of 1876, and in another and subsequent action between the same parties tried before Hon. MURRAY HOFFMAN* as referee (whose opinion has been submit-

* The following is the opinion of Hon. MURRAY HOFFMAN, the referee in the case of *Lafayette Ranney v. Sigmund M. Peyser* and John G. Farley, referred to above and dated August 8, 1876.

On April 1 and 2, 1872, the defendant, John G. Farley, was the owner of certain premises in the city of New York. On April 1, 1872, he executed a bond to Charles Doerfell and Frederick Scholtz, his bond conditioned for the payment of \$9,000 on April 1, 1877, with interest payable on October 1 and April 1 in each year. It was covenanted that if the interest should remain unpaid for the space of thirty days after it was due, then the principal sum and the arrears of interest should, at the option of the obligees, become due and payable. Farley and wife executed a mortgage on the premises, dated the same day, to secure the payment of such debt. On April 2, 1872, Farley executed to the same parties another bond to secure payment of the sum of \$3,500, payable May 15, 1875, with interest payable November 1 and April 1 in each year. This bond was also secured by a mortgage on the premises. On April 3, 1872, the obligees and mortgagees assigned the bonds and mortgages to Alfred B. Arnold, and they were regularly assigned to and vested in the plaintiff May 13, 1875. On October 23, 1872, Farley and wife executed and delivered to the defendant, Sigmund M. Peyser, a deed of the premises

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ted to me), views similar to those now expressed appear to have been entertained and adopted.

Judgment must be rendered in favor of the plaintiff.

covered by the mortgages. No consideration was inserted, but it was declared to be subject to the two mortgages now on the premises, amounting in the aggregate to \$12,500, the payment of which is hereby assumed by the party of the second part (the said Peyser).

On May 13, 1875, the plaintiff commenced an action of foreclosure of the \$9,000 mortgage on the ground of a failure in payment of the interest. The defendant, Peyser, answered, and on January 11, 1876, a judgment of foreclosure and sale was had. The property was sold and the proceeds were insufficient to pay any part of the second mortgage of \$3,500, that amount with all arrears of interest being due. The present action was commenced on March 11, 1876. Judgment is demanded that the defendant, Peyser, pay the said sum of \$3,500, interest and costs. On September 18, 1873, the defendant, Peyser, conveyed the premises to one Emile Von Schoening subject to the mortgages mentioned, and which were deducted from and allowed to said Von Schoening as part of the purchase money expressed in the deed.

Before the present action was commenced, and on May 21, 1875, Farley executed and delivered to Peyser an instrument of release, by which he released and discharged the said defendant, Peyser, from all actions and demands of every kind, and especially from all liability to pay any moneys mentioned in either of the two mortgages (one of \$9,000, and the other of \$3,500) mentioned in the conveyance made by him, said Farley and wife, to said Peyser, dated October 23, 1872.

On the same day, Peyser executed to Farley a corresponding release especially discharging him from all liability to pay any of the moneys mentioned in any mortgage on No. 325 Seventeenth street, or No. 514 Sixth avenue, in the city of Brooklyn.

That the interest upon the bond and mortgage for \$3,500, mentioned in the complaint herein, was paid down to May 1, 1875; and the interest next became due on November 1, 1875.

The main question in the case is as to the effect of the release given by Farley to the defendant, Peyser, of May 21, 1875. It is insisted that it discharges Peyser from all possible claim which the plaintiff, as holder of the mortgages, could have against him.

I have gone over the following leading authorities: *King v. Whitely*, 10 *Paige*, 465; 1 *Hoffman's Ch.* 477; *Russell v. Pistor*, 7

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iff, upon the issue of fact raised by the answer of the defendant McMullen.

Findings may be prepared and submitted by coun-

N. Y. 171 ; Trotter v. Hughes, 12 *Id.* 74 ; Hartley v. Harrison, 24 *Id.* 170 ; Bentley v. Vanderheyden, 35 *Id.* 677 ; Thorp v. Keokuk Coal Co., 47 *Barb.* 489 ; and the case of Mellen v. Whipple, 1 *Gray (Mass.)* 317 ; approved by Justice COMSTOCK in his dissenting opinion.

I deduce from the cases that in our State these are the rules established. That when the owner of land who has mortgaged it conveys it to another, who assumes the payment of the mortgage for or as part of the purchase money, a twofold relation is constituted : with his grantor, to protect him from any liability, so that if he is compelled to pay the debt, he shall be repaid ; and with the mortgagee, that by a species of subrogation, the former may resort to him directly to enforce the payment. The positions of the parties become such that the grantee is the principal debtor, and the grantor a surety.

Take the rules in the language of Justice WELLES, in *Russell v. Pistor* (7 *N. Y.* 171). It is a general principle that where the owner of land mortgages it to secure payment of a debt, and afterwards sells the equity of redemption subject to the lien of the mortgage, and the purchaser assumes the payment of the mortgage as a portion of the purchase money, the latter becomes *personally* liable for *payment* of the *debt* to the holder of the mortgage in the first instance, and if the mortgagor be compelled to pay it, he can recover it from the purchaser of the equity of redemption.

Now if this is law, it seems utterly incomprehensible how the grantor and mortgagor can release the grantee from his obligation, how the surety can discharge the principal debtor.

The case produced in evidence before me shows that the point of the release was raised in the former action, and Judge DONOHUE's decision must be treated as holding it inoperative. I consider it as no more than the opinion and decision of a learned judge at special term upon a question.

But the case of *Hartley v. Harrison* raises no little difficulty upon the point as to the release. It is contended that there is shown a judgment of the supreme court at general term, unreversed, to the effect that such a release by the grantor is valid. An attentive examination will, I think, warrant these conclusions. That the opinion of Justice MASON involves the result that such release is inoperative.

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sel for plaintiff, together with proper proofs of default on the part of the other defendants, and a proposed form of final decree.

That the opinion of Justice COMSTOCK is decidedly and strongly the reverse. That the judges who concurred in the result arrived at by Justice MASON, expressly refused to pass upon the question, and upon the grounds stated by Judge COMSTOCK, that the point was not raised by the appeal; was not before the court.

Justice COMSTOCK says: "No judgment has been rendered in this case, affirming the personal liability of Joseph Harrison . . . to pay the mortgage debt. . . . It is unnecessary, therefore, to inquire whether his liability was discharged by the subsequent release from the grantor in that deed." He proceeds to express his own conviction, that it could be effectual for that purpose.

But if this point was not before the court of appeals on the appeal to that court, how could it have been before the general term on the appeal thereto, so as to make it a point adjudged? Was there any other question properly before either court than whether the grantee could set up usury in the mortgage by virtue of the release from his covenants contained in the deed to him? Perhaps an examination of the original judgment roll may show that nothing was adjudged except the direction for a foreclosure and sale. But at any rate, the appeal taken, of course did not raise the question, which the referee determined in the appellant's favor, and there was no counter-appeal.

The cautious disclaimer of the concurring judges shows at least that the conclusion of the referee was not so clear that it might be left to an apparent tacit ratification.

Upon the question raised that the demand in this action should have been included in the former suit it is doubtful whether the plaintiff would have been bound to do so had he been able. But the answer is decisive that when he commenced the former action he had no cause of suit on the present claim. The summons in the other suit was served on Peyser May 14, 1875. The notice of *lis pendens* was filed on the same day. The principal of the present mortgage became due May 15.

Loomis v. Balheimer.

LOOMIS v. BALHEIMER.

N. Y. Supreme Court, Second Department, Second District; Special Term, July, 1878.

FORECLOSURE.—NEGLECT TO PROCEED.—EXONERATION OF COLLATERAL DEBTOR.

The rule in *Russell v. Weinberg* (4 *Abb. New Cas.* 139)—that where a mortgagor, having sold the mortgaged premises to one who has assumed payment of the mortgage, requests the mortgagee, after the mortgage becomes due, to foreclose immediately lest the premises become insufficient, the latter must do so or the former will be discharged from liability on the bond if the property afterwards becomes insufficient—applies where the mortgage is not due by its terms, but the holder of the mortgage has an option to declare the whole due by reason of a default in the payment of interest, taxes or installment.*

In such case the person collaterally liable is entitled to call on the holder of the mortgage to exercise his option and foreclose for the whole amount; and if he refuses to do so he cannot recover a deficiency against the one who made the request.

Trial by the court.

This action was brought by Harmon Loomis against George L. Balheimer and others, to foreclose a mortgage on real property. Balheimer had conveyed the mortgaged land to Lucas Koenig, the deed containing a covenant, on the part of Koenig, to assume and pay the mortgage and bond held by the plaintiff, which were the subject of the present action. The bond and mortgage gave to the mortgage creditor the option, in case of a default in the payment of interest or taxes, or any part of the principal, to have the whole amount of principal and interest, which was secured by the mortgage, become due and payable forthwith. A default occurred in November, 1876, which entitled the

* See also *Northern Ins. Co. v. Wright*, 13 *Hun*, 166.

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plaintiff to exercise this option. The action was not, however, commenced until April, 1878.

The plaintiff demanded a judgment for deficiency against the mortgagors; which they resisted, claiming that the plaintiff, by refusing to exercise his option when requested by the mortgagors to foreclose for the entire amount, and by receiving small payments on account during a year and a half delay, had exonerated them from liability.

The evidence was somewhat conflicting, but the plaintiff adduced and relied on affidavits tending to show that plaintiff had notice of the mortgagor's conveyance to Koenig, that he was requested on behalf of Balheimer to foreclose at about the time that the default occurred, and again subsequently; and that, meanwhile, the property had depreciated.

Henry Hagner, for plaintiff.

Simon Sultan, for defendants.—I. The defendant, Balheimer, having conveyed the mortgaged property to Lucas Koenig, with a covenant on the part of the latter to assume and pay the mortgage and bond held by the plaintiff, the relation of principal and surety was established between the parties to this conveyance, of which the plaintiff was bound to take notice (*Calvo v. Davies*, 8 *Hun*, 222; *Comstock v. Drohan*, *Id.* 373; *Burr v. Beers*, 24 *N. Y.* 178; *Garnsey v. Rogers*, 47 *Id.* 233; 1 *Hilliard on Mortgages* [4th Ed.] 357-359; *Colgrove v. Tallman*, 67 *N. Y.* 95).

II. The covenant giving the mortgagee the option in default of payment of the interest or taxes, or the accruing part of the principal to have the whole amount of principal and interest secured by the mortgage and bond become and be due forthwith was a covenant, the plaintiff was in duty bound to assert when requested to do so by the defendant (*Hunt v. Roberts*, 45 *N. Y.* 691, 696).

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III. The neglect of the plaintiff to foreclose the mortgage when he was requested to do so, and default had been made which entitled him to do so, connected with the proof that by reason of such neglect and the unauthorized indulgence shown by the plaintiff to the owner of the equity of redemption, the property which was the primary fund for the payment of the mortgage debt, has depreciated in value, and the responsibility of Lucas Koenig, the party primarily liable, has become impaired, discharges the defendant from liability for any deficiency of the mortgage debt, which might have been prevented by diligent action on the part of the mortgagee (*Russell v. Weinberg*, 2 *Abb. New Cas.* 422; *Black River Bank v. Page*, 44 *N. Y.* 453; *Colgrove v. Tallman*, 67 *Id.* 95; *Northern Ins. Co. of N. Y. v. Wright*, 6 *N. Y. Weekly Dig.* 78).

GILBERT, J.—Judgment for plaintiff with costs, except that the mortgagors are relieved from any deficiency and from costs. No costs to mortgagor.

ENOCH MORGAN'S SONS' COMPANY v.
SCHWACHOFER.

N. Y. Supreme Court, First Department; Special Term, January, 1878.

TRADEMARKS.—COLORABLE IMITATION.

The doctrine of relief in equity against infringement of trademarks rests upon the principle that no one should be permitted so to dress his goods for sale as to enable him to induce purchasers to believe that they are the goods of another.*

* Earlier cases have sought for various theories in support of this branch of equity jurisprudence. Some authorities put it on the basis of property in plaintiff violated by defendant; others on the basis of fraud and deceit actually committed to the injury of plaintiff; others

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To sustain an action in a State court for an injunction against an infringement or imitation of trademark or labels, plaintiff, although

on damage to him by interference with his trade; and more still, on several of these elements; all, however, seeking for a guide in analogy to other classes of actions for injuries to property, or for fraud. In many cases, therefore, the courts have laid down rules drawn from these analogies, which have limited in various incongruous ways the relief that the courts might otherwise properly give. And much of the conflict in the cases arises from the inherent difficulty of limiting a branch of equity jurisdiction which has its own peculiar necessity and natural limits, by rules which have their origin and propriety in the peculiar character of other branches. The elements of property and of fraud are usually involved, incidentally at least, and considerations of public policy have infused wholesome energy into the modern line of decisions on this subject. The true basis of relief, however, and its just limits are found not in resorting to rules appropriate to other classes of cases, but in the application of the test announced by Mr. Justice LAWRENCE in the case in the text. The gist of the cause of action is in the fact that defendant is sailing under false colors to the danger of plaintiff's legitimate trade.

The extension of the principle beyond cases of trademarks, in which it seems to have originated, to the protection of signs, labels, wrappers, colors, and the like, illustrate the true basis of the doctrine.

In Massachusetts, where the court has been very cautious in granting relief, and has hesitated to extend the rule, the style and color of label have been recognized as proper subjects of protection beside what is usually understood as a "trademark."

In *Dixon v. Dixon*, which has never been reported, the plaintiff's labels contained the following words:

"Stove Polish, Dixon's Prepared Carburet of Iron. Price 10 cents.

"Prepared from pure carburet of iron only by Joseph Dixon & Co., black lead crucible manufacturers and practical chemists, Jersey City, N. J."

[Here followed recommendations, &c.]

One of the imitations by John Dixon and one Meyer had "John Dixon & Co.'s," instead of "Dixon's." Another had the words "Prepared from pure carburet of iron only for George M. Dixon, wholesale druggist, northeast corner of and Main streets, Cincinnati, Ohio," instead of the corresponding clause in the genuine.

The decree by BIGELOW, J., awarded a permanent injunction according to the prayer of the bill, protecting both the general style and color of package, contents of labels and the trade-cards.

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his label contains a registered trademark, need not prove an imitation of that mark. It is enough if the general effect of defendant's wrapper and label constitute a wrongful imitation of those of plaintiff, although defendant may have replaced the symbol or "trademark" with a clearly different device.*

Trial by the court.

Enoch Morgan's Sons' Company, a manufacturing corporation formed under the laws of New York, sued John T. Schwachofer for an infringement of the trademark and labels, &c., of Sapolio, described in the complaint as consisting of the symbol of a human face reflected in a polished pan; of the word "Sapolio"; of wrapping a cake of Sapolio in an argentine foil covered paper, so as to present a silvery surface to the outside of the package, and encircled by an ultramarine colored band of paper, of about half the width of the package, extending entirely around it, and printed in gold letters.

The defendant, under the name of the East River Chemical Works, had, for some time, been engaged in selling an article called Saphia, of substantially the same properties as Sapolio, and put up in a cake of very nearly the same size and shape, wrapped in similar argentine foil covered paper, and encircled in like manner with the plaintiff's article by an ultramarine

Defendants violated the injunction, and were convicted of a contempt in so doing by HOAR, J.

For other and more recent authorities, see *McLean v. Fleming*, U. S. supreme court, 18 *Alb. L. J.* 38; *Colman v. Crump*, 70 *N. Y.* 573; *Caswell v. Davis*, 58 *Id.* 223, and cases cited; *Taylor v. Gillies*, 59 *Id.* 331, and cases cited; *Talcott v. Moore*, 6 *Hun*, 106.

* So when one trader sells an unpatented production of his own in bottles or casks indelibly marked with his known design, the court will restrain a rival trader from selling a similar production in the same bottles or casks, although the rival trader puts a label of his own thereon. *Ch. Div.*, April 10, 1878, *Rose v. Loftus*, 38 *Law Times Rep. N. S.* 435. *S. P.*, *Singer Machine Manuf. v. Wilson*, *L. R.* 3 *App. Cas. H. L.* 376.

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colored band of paper, printed in gold, bearing upon one side the word "Saphia," or the "Queen's Brilliant," and on the other side the symbol of a woman's face looking at an article held up in one hand. The printing of the symbol and of the lettering upon "Saphia" was in gilt, and bore the same general resemblance to that of the plaintiff's Sapolio, as would be presented by a cake of nearly the same dimensions, encircled in the same kind of silver paper and banded around by a blue colored paper band.

Other facts appear in the opinion.

An application for a preliminary injunction had been denied.

John Henry Hull and *Clarence A. Seward*, for the plaintiff.

J. H. Stanbrough and *J. Kugelmann*, for the defendant.

LAWRENCE, J.—It is quite difficult, in actions of this character, to precisely draw the line between those cases in which the plaintiff is entitled to relief, and those in which relief should be denied. The decisions are conflicting, and many of them irreconcilable; but, in this case, after fully considering the evidence, I am of the opinion that the plaintiffs are entitled to a portion, at least, of the relief which the complaint demands.

Upon principle, no man should be allowed to sell his goods as the goods of another, nor should he be permitted so to dress his goods as to enable him to induce purchasers to believe that they are the goods of another.

In the consideration of this case, I shall lay out of view the United States statute in relation to trademarks, because that provides that "nothing in this chapter shall lessen, impeach or avoid any remedy at law or in equity which any party aggrieved by any

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wrongful use of any trademark might have had if the provisions of this chapter had not been enacted." I do not, therefore, regard the plaintiffs as being compelled, in order to obtain the relief they seek in this action, to show that there has been an imitation of the trademark which the plaintiffs have filed in the patent-office.*

It would seem that the true rule is laid down in the case of *Edleston v. Vick* (23 *Eng. L. & Eq.* 51, 53), where Vice-Chancellor WOOD, adopting the language of Lord LANGDALE in *Croft v. Day* (7 *Beav.* 84, 87), says, "That what is proper to be done in cases of this kind depends on the circumstances of each case. . . . That for the accomplishment of a fraud in each case two circumstances are required—first, to mislead the public; and next, to preserve his own individuality." Commenting further upon the language of Lord LANGDALE in *Croft v. Day*, the vice-chancellor proceeds: "Now, in that case of *Croft v. Day* there were, as Lord LANGDALE said, many distinctions between the two labels; and in this case before me, just as in that case of *Croft v. Day*, any one who takes upon himself to study the two labels, will find even more marks of distinction than were noticed in argument. But in this case, as in that, there is the same general resemblance in color. Here there is the same combination of colors, pink and green; there is the same heading, 'Her Majesty's Letters-patent,' and 'solid-headed pins,' and the name 'D. F. Taylor,' with the words 'exclusively manufactured,' upon the two labels, which are of precisely the same size, and the scrolls in the same form, and 'exclusive patentees' in an exactly similar curved line. . . . Nor does it rest only with the general resemblance of the outer wrappers; the papers in which the defendants' pins are stuck, bear also a great simi-

* See *Popham v. Wilcox*, 14 *Abb. Pr. N. S.* 206.

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larity ; they are as like as can be to the papers in which plaintiff's pins are stuck." Then, after stating that he agrees that there must be an intent to deceive the public, the vice-chancellor holds that the defendants, both in the outer and inner wrappers, made a palpable imitation with the intent to deceive the public, and he accordingly restrained them. I have referred to this case at length because it seems to me to be peculiarly in point.

But there are several authorities in our own courts which uphold the same doctrine. In *Williams v. Spence* (25 *How. Pr.* 367), *MONELL, J.*, says : "The only question to be determined, therefore, in this case, is whether the labels, devices and handbills used by the defendants, as set forth in the complaint, are calculated to and do deceive the public into the belief that the soap they are selling is the soap made and sold by the plaintiff. . . . The oral evidence that the labels, devices and handbills used by the defendants are calculated to deceive the public also preponderates ; and an inspection of the respective labels, devices and handbills satisfies me that the public would be readily deceived, and purchase the defendants' soap under the belief that they were purchasing the plaintiff's."

In *Lea v. Wolf* (13 *Abb. Pr. N. S.* 391), *Mr. Justice INGRAHAM* says : "The color of the paper, the words used, and the general appearance of the labels when used, show an evident design to give a representation of those used by the plaintiff. . . . It is impossible to adopt any conclusion other than that the intent was to leave purchasers, from the general appearance of the article, to suppose that it was the original Worcester-shire sauce which they were buying" (See also *Cook v. Starkweather*, 13 *Abb. Pr. N. S.* 392).

And in *Lockwood v. Bostwick* (2 *Daly*, 521), it was held "that a party will be restrained by injunction

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from using a label as a trademark, resembling an existing one in size, form, color, words and symbols, though in many respects different, if it is apparent that the design of the imitation was to depart from the other sufficiently to constitute a difference when the two were compared, and yet not so much so, that the difference would be detected by an ordinary purchaser unless his attention was particularly called to it and he had a very perfect recollection of the other trademark."

And in *Kinney v. Basch* (16 *Am. Law Reg. N. S.* 597), Mr. Justice VAN BRUNT says, "A careful inspection of the labels in question shows, beyond a doubt, that those of the defendant were adopted in order to deceive the public when they purchased the cigarettes of the defendant's manufacture."

I am satisfied from the evidence in this case that the intention of the defendant has been, from the first, to make an article as nearly as possible resembling that manufactured by the plaintiffs, and to put it off upon the public as the same article. I am also satisfied that it was the intention of the defendant, in adopting the blue and tinfoil wrappers, and in printing on them the directions for use in language so closely resembling that employed by the plaintiffs, to impose upon the public and to lead purchasers to believe that in purchasing the defendant's article, they were, in fact, obtaining the sapolio of the plaintiffs. In this connection the wonderful similarity of the color of the inside of the tinfoil wrapper, used by the defendant, with that used by the plaintiffs, should not be forgotten.

The whole case, to my mind, shows an intention, on the part of the defendant, to avail himself of the reputation which the plaintiffs had acquired in the market for their sapolio, by their enterprize and ability, and by the large expenditures which they had made in bringing the sapolio to the attention of the public.

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It appears that the plaintiffs have been for many years engaged in manufacturing sapolio; that the article has acquired a great reputation, and that the plaintiffs have expended very large sums of money in advertising. The evidence shows that the defendant, after analyzing a cake of sapolio and ascertaining how it was made, set about making an article similar in character, color and appearance to that of the plaintiffs. This he may possibly have a right to do;* but when the court finds that the defendant, after having possessed himself of the secret of the manufacture of the plaintiffs, has, in addition, coined a name much resembling sapolio, in appearance, and which he admits is a fancy name, having no particular derivation or signification, and has then proceeded to encase his cakes of saphia in wrappers also closely resembling the plaintiff's both in their external and internal appearance, as to color, size, and partially as to inscription and directions for use, the court has, in my judgment, the power to interfere, and should exercise its power.

It is claimed that the plaintiffs cannot have an exclusive right to use tinfoil or ultramarine blue colored paper, in putting up their article, as such paper is much used for ordinary commercial purposes.

This is true, but the cases cited show that the courts will interfere where it is apparent that there is an imitation of the plaintiffs' label, whether as to color, shape or inscription, which imitation is calculated and intended to deceive the general public. The evidence satisfies me that the blue wrapper, as used by the

* One who, without unfair means, learns the secret of the preparation of an unpatented article, universally known by the name of the original producer, may, after the latter's death, make and sell the article, and advertise it as made from the original recipe, provided he does not lead the public to suppose that the article sold by him is made by the successors in business of the original producer. *Masam v. Thorley's Cattle Food Co.*, 86 *Law Times Rep.* N. S. 848.

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defendant, is calculated to deceive purchasers, and I think it is very clearly proven that the ordinary purchaser is deceived by the similarity of the dresses in which the soaps are put upon the market. A critical and careful examination of the two packages will undoubtedly reveal distinctions and differences between the labels, and the devices thereon are different, but there is such a general resemblance that, to borrow the language of the vice-chancellor, in *Edelston v. Vick*, *supra*, "The court or jury would be bound to presume that it was not a fortuitous concurrence of events which has produced this similarity; it would be irrational not to rest convinced that this remarkable coincidence of appearance, external and internal, is the result of design." In the case of *Abbott v. Bakers' and Confectioners' Tea Association* (*Weekly Notes*, 1872, p. 31) an injunction had been issued restraining the defendants from issuing wrappers which were in imitation of those of the plaintiffs. On appeal the lord chancellor said: "That though no one particular mark was exactly imitated, the combination was very similar, and likely to deceive. It was true that there was no proof that any one had been deceived, or that the plaintiffs had incurred any loss; but where the similarity is obvious that was not of importance." The appeal was therefore dismissed (see case reported below; *Weekly Notes*, 1871, p. 207). This last case seems decisive of the question now under consideration (see, also, *Lockwood v. Bostwick*, 2 *Daly*, 521; *Godillot v. Hazard*, 49 *How. Pr.* 10).

I am therefore of the opinion that the plaintiffs are entitled to an injunction restraining the defendant from vending saphia in the blue packages in which it is now sold. By this I do not mean to be understood as holding that the defendant has not the right to manufacture and also sell saphia, nor to restrain him from the use of that name, or of the figure or device upon the label.

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But I do intend that he shall abstain from dressing his goods in wrappers so closely resembling the plaintiffs' as to enable him to deceive the public, and perpetrate a fraud. That he shall not sell saphia as and for sapolio. In other words, he must sell under his own colors, and not under those of the plaintiffs.

Judgment accordingly.

There was no appeal.

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City Court of Brooklyn; Special Term, December, 1877.

SIGNS AND TRADEMARKS.—INJUNCTION.

On the retirement of a partner from a firm, his copartners continued the business at the old place, and the retiring partner embarked in the same line of business, and on the same side of the same street, and within about fifty feet from the old store, and put up a sign bearing, in the first line, his own name; in the second line, the words, "*of the late firm of;*" and, in the third, the name of the old firm; the second line being in letters of good size, yet but little more than a third the height of the letters in the third line. *Held*, that an injunction should issue to restrain this use of the firm name.

There being no good reason for such a distinction in the size of the words it must be inferred that the sign was calculated to mislead, and actual fraudulent intention need not be established.

Action for an injunction.

Edward Smith, Allen Gray, John S. McKeon and Millard F. Smith, brought this action against Thomas S. Cooper to enjoin his use of the late firm name.

For some time prior to January 1, 1876, the defendant had been a member of the firm of Smith, Gray, Cooper & Co., doing business as clothiers, on Broadway, in this city. The copartnership term having expired,

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he retired and embarked in the same line of business at his present place, on the same side of Broadway, distant about fifty feet from the old store, where the plaintiffs continued the business. He put up a sign on the front of his store, the words thereon arranged in three lines: in the first or top line, his name, "T. S. Cooper," and in the third or bottom line, the name of the old firm, "Smith, Gray, Cooper & Co.," are in letters eleven and a half inches long, and in the second or intermediate line, the words "of the late firm of" are in letters about four and a half inches long.

Philip S. Crooke, for the plaintiffs.

Tracy & Catlin, for the defendant.

NEILSON, Ch. J.—The question is whether the words, as thus arranged, performed the mere office of informing the public that the defendant was engaged in business there and was the same person who had been a member of the old firm, or whether they were calculated to mislead the public and divert to that store the customers of the plaintiffs or persons intending to become such customers.

It was urged on behalf of the defendant that as the buildings occupied by the parties are quite unlike: that of the plaintiffs much the largest, ornamental and of iron, that of the defendant plain and of brick, persons acquainted with the plaintiffs' place, and paying some attention to appearances, would not mistake the one store for the other. That is true, and would be of importance in the absence of any device creating an artificial or seeming relation between the two stores, or even with such device if all persons would "pay attention to appearances." As an illustration it may be sufficient to say that in a well-considered case in which the defendant was enjoined by reason of the character of his sign, the stores were in different parts of the city of London, so that anyone who would take the

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trouble to consider the matter could see that the defendant's place of business, which was on Oxford street, was not that of the plaintiff, which was and always had been on the Strand.

It was shown by witnesses for this defendant that the words "of the late firm of" are in letters as large as those on some signs put up for business purposes. But there is a difference between the effect of words of a reduced size when standing alone, or when coupled with other and larger words. The latter, especially if in the lowest line, would catch the eye when the smaller words on the line above would not. So, too, it was proved that the words "of the late firm of" could be read from the opposite side of the street and from the corner two hundred feet away. That being so it would have been quite to the purpose if some good reason could have been given for having the words that follow those much larger. If the words "of the late firm of" are in letters large and plain enough, why should the name of the old firm be in letters more than twice that size? There is,—indeed, can be,—no good reason. Without imputing to the defendant any fraudulent intention, the element of fraud not being material in cases of this class (*Millington v. Fox*, 3 *M. & C.* 338), it is impossible to avoid the conviction that this sign was cunningly arranged, and is calculated to mislead persons not pausing to read or consider all the words on it. It was proved that some persons were in fact misled, that on seeing the words "Smith, Gray," they went into the defendant's store to make purchases when they had intended to go to the plaintiffs' store.

The equitable principles governing questions of this character have been concurrently applied by the courts in this country and in England, and in cases less marked and decisive than this case, injunctions have been granted.

In *Croft v. Day* (7 *Beav.* 84), the master of the

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rolls, after noticing, between the two labels, distinctions sufficient to protect one who took upon himself the task of study and comparison, came to the conclusion that there was quite sufficient to mislead the ordinary run of persons, and lead them to believe that the new establishment was, in some way or other, connected with the old, and the defendant was restrained.

In *Glenny v. Smith* (2 *Dr. & Sm.* 476), the defendant, a clerk, on leaving the plaintiff's firm and starting the same kind of business, put on his sign the words "From Thresher and Glenny," the word "from" in smaller letters than the rest. In holding that to be improper, the vice-chancellor said that it was vain for witnesses on the defendant's part to say that, in their opinion, persons could not be misled; that where one went to try the effect of his own inspection, he knew what he would find, and was prepared to look for the word "from," but the general public would be off their guard when they passed the shop. He further said that it was not a question whether the public generally, or even a majority of them, were likely to be misled, but whether the unwary, the heedless portion of the public, would be misled.

In the case of *Hookham v. Pottage* (*L. R.* 8 *Ch. App.* 91), the question arose, as it does here, between persons who had been copartners. The defendant, retiring and on his own account engaging in the same line of business, put up the words "S. Pottage, from Hookham and Pottage" on his sign. The word "from" and the word "and" were in small capitals, the other words in large Roman capitals. The vice-chancellor granted an injunction against the use of the sign, and on appeal that was affirmed. Sir W. M. JAMES, Lord Justice, in considering the case, said that the question was "whether the conduct of the defendant was calculated to mislead the casual passer-by," and he came to the conclusion that as the words "Hookham and

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Pottage" were in almost as conspicuous characters as "S. Pottage," a stranger would be naturally misled.

The cases of *Glenny v. Smith*, and *Hookham v. Pottage*, are referred to with approbation in 61 *N. Y.* 234. The cases of *Devlin v. Devlin* (4 *Hun*, 651),* and *Peterson v. Humphrey* (4 *Abb. Pr.* 394), and other cases which might be cited, illustrate the same doctrine.

The plaintiffs must have judgment restraining the defendant from using the sign in question.

HARRIS v. ELDRIDGE.

N. Y. Supreme Court, Third Department, Fourth District; Special Term, January, 1879.

PARTIES.—SINGLE INSTRUMENT.—PLEADING.—CODE OF CIV. PRO.,
§ 537.

If a guarantor engages alone by a separate writing, distinct from the instrument signed by the maker, although indorsed thereon, his contract is a separate cause of action; and in an action against both the complaint is demurrable, on the ground that causes of action have been improperly united.†

Demurrer is proper, irrespective of whether the causes of action are separately stated or commingled.

* Same case more fully reported in 67 *Barb.* 290; *aff'd* with hesitation in 69 *N. Y.* 212.

† This decision applies, under the Code of Civil Procedure, the same rule of non-joinder of a separate guarantor with his principal that was applied under the former Code, § 120, and *L.* 1837, c. 92. The language of the provision of the Code of Civil Procedure, § 454, which supersedes the former, is as follows: "Two or more persons severally liable upon the same written instrument, including the parties to a bill of exchange or a promissory note, whether the action is brought upon the instrument, or by a party thereto to recover against other parties liable over to him, may, all or any of them, be included as defendants in the same action, at the option of the plaintiff." See also *Barton v. Speis*, 1 *Hun*, 60, 61; *Decker v. Gaylord*, 8 *Id.* 110; *Brown v. Champlin*, 66 *N. Y.* 214; *Laurence v. Gallagher*, 42 *Super. Ct. (J. & S.)* 309.

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The substantial remedy by demurrer should not be denied merely because the party whose pleading is demurred to has disregarded the rules of practice.*

Motion for judgment.

Plaintiff moved against the defendant Eldridge, for judgment for the frivolousness of the demurrer, pursuant to section 537 of the Code of Civil Procedure.

The action is brought upon a promissory note made by the defendant Alger, and guaranteed by the defendant Eldridge. The complaint contained but one count. It is averred: (1) that the defendant, Alger, made his promissory note for \$1,257, at three months, dated August 27, 1878, and the note is set out by copy in full, in words and figures; (2) that it was delivered

* Former decisions have often overruled demurrers on the ground that the objectionable pleading might have been corrected by motion. The decision in the text proceeds on a more liberal but not a more lax doctrine, that allows the court to correct a demurrable fault, on demurrer, although other faults were involved, and other remedies might be used. Serious faults in pleading are almost always committed in a way which violates more than one canon of correct practice, and involves the adverse party in more than one inconvenience; and the tendency of the courts now is, while applying liberal rules of construction, and leniently dealing with verbal and formal defects, to recognize the right of each party to substantially good pleading on the part of the other; and when a substantial defect is objected to in any proper manner, to deal with it directly, instead of turning the parties over to another form of objecting, on the ground that it would have been more convenient in the first instance.

Many pleadings which might be the subject of a motion to make more definite and certain, are equally obnoxious to a demurrer, not indeed because of want of definiteness and certainty, alone, but because of that kind of uncertainty which is fatal to the substance of the pleading, namely: in a point vital to the existence of a cause of action or a defense.

For illustrations see *City of Buffalo v. Holloway*, 7 *N. Y.* 493; *Butler v. Viele*, 44 *Barb.* 166; *Simmons v. Fairchild*, 42 *Id.* 404; *Commercial Bank of Rochester v. City of Rochester*, 41 *Id.* 341; *Hofheimer v. Campbell*, 50 *N. Y.* 274.

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to Eldridge, who indorsed his guaranty thereon, and the guaranty is also set out by copy, as follows:

"SARATOGA SPRINGS, Aug. 27th, 1878.

"For value received I hereby guarantee the payment of the within note. In renewal.

"THOMAS ELDRIDGE."

(3) That the note was transferred to the plaintiff before it became due, and that he is the owner and holder of it.

Judgment was demanded against the defendants for the amount with costs. The defendant Eldridge, demurred, alleging for grounds of demurrer, in effect, that it appeared on the face of the complaint that several causes of action had been improperly united.

W. M. Searing, for plaintiff.

Van Rensselaer, Hill & Roads, for defendant Eldridge.

BOCKES, J.—Two separate causes of action are united in the complaint; one against Alger as maker; the other against Eldridge as guarantor. The note and the guaranty indorsed on it are separate instruments and constitute separate causes of action (*Allen v. Fosgate*, 11 *How. Pr.* 218; *De Ridder v. Schermerhorn*, 10 *Barb.* 638; *Tibbits v. Percy*, 24 *Id.* 39). Those cases are not overruled by *Carman v. Plass* (23 *N. Y.* 286), nor by *Decker v. Gaylord* (15 *N. Y. Sup. Ct.* [8 *Hun*] 110), where the actions were brought against lessee and guarantor, both having executed the same instrument. The case in hand is like *Barton v. Speis* (12 *N. Y. Sup. Ct.* [5 *Hun*] 60). Now here the facts stated show a good cause of action against each defendant separately; but not a good cause of action against them jointly. Here then are two causes of action improperly united in the same complaint.

The next question is, may the defendants demur to the pleading? They might do so undoubtedly had

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the causes of action been separately stated ; that is, in separate counts. This was held in *Barton v. Speis*, above cited ; but it was then said, per MULLEN, J., that a complaint can only be demurred to for an improper joinder of causes of action when they are set out in separate counts ; that when contained in a single count (such is the case at bar), the remedy of the defendant was by motion. The learned judge cites *Cheney v. Fisk* (22 *How. Pr.* 236), in support of this ruling. It is doubtful whether that case so holds. That rule would be a sound one when different causes of action are stated in the same count against one and the same defendant (*Bass v. Comstock*, 38 *N. Y.* 21. See also remark of MARVIN, J., in *Hess v. Buffalo & Niag. Falls R. R. Co.*, 29 *Barb.* 395). The question, however, is now put at rest by the court of appeals. It is now decided by that court that a party may demur for an improper uniting of causes of action, although both be stated in the same count (*Wiles v. Suydam*, 64 *N. Y.* 173 ;* *Goldberg v. Utley*, 60 *Id.* 427). In the last case cited Judge CHURCH says : "If the complaint contains several causes of action improperly united contrary to the code . . . , the vice may be reached by demurrer, and the failure . . . to state them separately and number them would not be an answer to it, nor would a failure to move to correct the complaint in this respect defeat the effect of a demurrer." The learned judge completely covers the case in the additional remark, that the plaintiff cannot deprive the defendant of the benefit of a demurrer upon this ground ; and further, that a substantial remedy cannot be prevented by a neglect to observe the rules of practice, nor in a case like this would the defendant be regarded as waiving such remedy by not making a motion. The motion for judgment must be denied.

Motion denied with costs.

* Reported below in 3 *Hun*, 604 ; S. C., 6 *Sup'm Ct. (T. & C.)* 292.

Cullen v. Miller.

CULLEN v. MILLER.

N. Y. Superior Court ; Special Term, October, 1878.

CLAIM AND DELIVERY OF PERSONAL PROPERTY.—JUSTIFICATION OF SURETIES.—REPLEVIN.—LIABILITY OF SHERIFF.

If the defendant excepts to the plaintiff's sureties, in an action for the claim and delivery of personal property, and they fail to justify, he is not entitled to an order directing the sheriff to deliver the property to him. By excepting to the sureties, he waives a return before judgment in the action.

Motion by defendant for re-delivery of property replevined.

The action was by Elizabeth Cullen against George Miller, for the claim and delivery of personal property.

The defendant excepted to the plaintiff's sureties, and upon their failure to justify, made this motion for the re-delivery to him of the property.

James A. Blanchard, for the defendant.

I. S. Ormiston, for the plaintiff.

Vanderpoel, Green & Cuming, for the sheriff.

VAN VORST, J.—The defendant excepted to the sureties given by the plaintiff, and they failed to justify. The defendant now moves that the sheriff be directed to deliver the property to him. The only provision in the code, looking to a return of the property to the defendant, before judgment in his favor in the action, is contained in section 211. If the defendant does not except to the plaintiff's sureties, he may require such return by executing and giving to the sheriff a proper undertaking for the delivery thereof to the plaintiff, if such delivery be adjudged. This return must be required within three days after the taking by the sheriff, and if not so required, the

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sheriff's duty is to deliver the property to the plaintiff.

The defendant did not pursue this course, and has interposed no effective obstacle to the delivery of the property to the plaintiff, unless his exception to the plaintiff's sureties has had that effect.

But section 210 provides that if the defendant except to the sureties, he cannot reclaim the property, as provided in section 211. *Manley v. Patterson*, 3 *Code Rep.* 89; and *Hofheimer v. Campbell*, 59 *N. Y.* 269. are adjudications adverse to the defendant's claim. The defendant objects to the hardship of this conclusion; but if there be any fault, it lies in the condition of the law.

Some support to defendant's application is sought to be derived from the practice in relation to the old action of replevin, and reference is made to section 30, chapter 8, part 3, title 12 of the Revised Statutes (2 *Edmonds' Stat. at L.* 545).

But I cannot discover, from that section, anything to justify this motion for a return of the property to the defendant, before judgment.

It is there provided that if the plaintiff's sureties do not justify, the court, at the next term, shall render judgment of discontinuance against the plaintiff, and such other judgment as the case may require, in order to restore to the defendant the property replevined.

That this action may not be discontinued by the court for the failure of the sureties to justify, is stated in *Manley v. Patterson* (*supra*), and the reasons for the conclusion are satisfactory.

Chapter 342 of the Laws of 1839, section 3,—being an amendment of an act entitled of the action of "replevin,"—was applicable only to the city of New York. It did, however, provide that in the event of the failure of the sureties to justify, an order should be made by the officer before whom the sureties were sum-

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moned, directing the sheriff to deliver the property replevined to the defendant.

But subsequent legislation on this subject, embodied in the code, is significant, and indicates that the present condition of the law on this subject was designed.

The code of 1848, section 185, contained a specific direction, following the act of 1839, that the sheriff should deliver the property to the defendant, if the plaintiff's sureties, on being excepted to, failed to justify.

But this provision was dropped by the amended code of 1849, when sections 209, 210, 211, as they now exist, were adopted.

The action of replevin, and the former statutory provisions respecting it, were superseded by the provisions of the code, which contains a complete system of procedure for the claim and delivery of personal property, and the statute of 1839, above referred to, is not in force (*Code*, §§ 468, 471, 472).

Upon the commencement of an action for the recovery of personal property, the defendant, under the code, has the right to elect whether the plaintiff or himself shall have the control of the property before judgment.

If he excepts to the plaintiff's sureties, he elects not to hold the property himself, and shows himself content to abide the event of the action.

And if the plaintiff's sureties, given to the sheriff, fail to justify, his remedy against the sheriff is assured in the event that it be determined in the action that he is entitled to a return of the property (*Graham v. Wells*, 18 *How. Pr.* 376).

The plaintiff's motion must be denied, but without costs.

Browning v. Marvin.

BROWNING v. MARVIN.

N. Y. Supreme Court, First Department; Special Term and Chambers, September, 1878.

REFERENCE.—WAIVER OF REFEREE'S OATH.—CODE OF CIV. PRO.
§ 1016.

A referee appointed to hear and determine the issues in an action must take the oath prescribed by section 1016 of the code of civil procedure.

A waiver must be entered in the minutes. Even attending and refusing for another reason to go on, does not waive the objection unless a waiver is so entered.

Motion to vacate a judgment entered on the report of a referee.

This was an action by John H. Browning against Oliver W. Marvin.

The cause was referred by compulsory order at circuit, defendant not being ready for trial.

Motion to vacate the order was made on the ground that it deprived the defendant of trial by jury. Motion denied, and an appeal is pending.

Plaintiff brought on the cause before the referee, August 1, 1878. Defendant's counsel attended and stated that he had appealed; and refused to go on. The referee proceeded in the defendant's absence, and on the same day rendered a report in favor of plaintiff, on which judgment was entered August 15, 1878.

Defendant moved to vacate the judgment, because the referee never acquired any jurisdiction and had no right to take any testimony or do anything in the matter until he had taken the oath required under section 1016 of the code of civil procedure.

Henry C. Willcox, for the motion.—The oath may be waived in two ways only: First. By stipulation in

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writing signed by all the parties. Second. Orally before the referee, all the parties being present; but if orally, such waiver must be entered in the referee's minutes. In this case no waiver was made, either in writing or orally, and no record of any such waiver appears anywhere, as it could not. The section of the code in explicit on this subject. It says the referee, *before* proceeding to take any testimony, *must* be sworn, &c., &c. (*Code of Civ. Pro.*, § 1016; *Exchange Fire Ins. Co. v. Early*, 4 *Abb. New Cas.* 78). Judge DALY of the common pleas set aside a referee's report and all proceedings thereunder, including a sale of property, and vacated the order of reference.

Oscar Frisbie (*Oliver S. Ackley*, attorney), opposed.

LAWRENCE, J.—This motion must be granted (See *Code*, § 1016; *Exchange Fire Ins. Co. v. Early*, 4 *Abb. N. C.* 78).

There was no waiver of the oath of the referee. It was not competent for the plaintiff alone to make such waiver, and the alleged waiver was not entered in the minutes (See *Code*, § 1016).

QUINCEY v. FRANCIS.

N. Y. Supreme Court, First Department; Special Term and Chambers, October, 1878.

ATTORNEY'S LIEN.—DISCONTINUANCE OF ACTION.

An attorney at law has no lien upon a cause of action growing out of a libel, for his services in the action, before judgment recovered. The fact that the plaintiff had promised the attorney, before the action was commenced, that he should receive the damages to be recovered, for his services in the action, creates no lien on the cause of action, and will not prevent the plaintiff from discontinu-

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ing the action, at any time before judgment, without the consent of the attorney.*

Motion by defendants to discontinue action.

The action was by William H. Quincey against John M. Francis and another, for libel.

The facts sufficiently appear in the opinion.

C. W. Brooke, for the motion.

H. H. Morange, opposed.

VAN VORST, J.—The cause of action was not attempted to be assigned by the plaintiff to his attorney. The action, being for a libel, was not assignable (*Townshend on Slander and Libel*, § 299; *Pulver v. Harris*, 52 N. Y. 73); but the attorney served on the defendants' attorneys a notice that he had a lien on the cause of action set forth in the complaint, and that any settlement without his written consent would be of no effect.

As a rule, an attorney has a lien for his costs upon any judgment obtained through his services, and which lien the court will protect against any unfair dealing by the client, with respect to the judgment or cause of action.

This lien does not, however, arise until judgment recovered.

Before judgment, the parties may settle the suit without reference to the claims of attorneys for services rendered, the remedy of the attorney for his services being against the party employing him.

But the attorney claims that before the action was commenced, the plaintiff promised that the damages which should be recovered would belong to his attorney for his services.

* See also *Coughlin v. N. Y. Central, &c. R. R. Co.*, 71 N. Y. 488, rev'g 8 Hun, 136.

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It was this promise of the plaintiff, which is supposed to give the attorney such a lien upon the cause of action as to prevent the discontinuance of the suit by the party, without the consent of the attorney.

I cannot see to what the lien claimed by the attorney ever attached. His compensation was to be received through the damages to be recovered in the action.

When the promise was made by the plaintiff to his attorney, no damages had been established, and it was not certain that any would ever be recovered.

Liens attach only to property in existence.

I fail to see how the promise made by the party to his attorney would deprive him of the right to discontinue the cause of action, on receiving, as was done in this case, a retraction from the defendant of the libel.

With this retraction the plaintiff was satisfied, without any pecuniary compensation by way of damages.

The defendant has made a satisfactory reparation to the plaintiff, and I do not think that the ends of justice required that the plaintiff should be compelled to continue a libel suit against parties who were willing to make, and have made all the amends necessary to satisfy the wounded feelings of the plaintiff. Courts and counsel should rather facilitate than place obstacles in the way of such amicable adjustment of suits of this character.

Pulver v. Harris (*supra*) is decisive of this motion.

The attorney has his remedy against the plaintiff, for the services rendered by him in the action.

The case should be stricken from the calendar, and an order of discontinuance entered.

Matter of Horsfall.

MATTER OF HORSFALL.

N. Y. Common Pleas ; General Term, February, 1879.

GENERAL ASSIGNMENT.—DISCHARGE OF ASSIGNEE.—ACCOUNTING.—

WAIVER.—COMPOSITION.—RELEASE OF SURETIES.

An assignee for the benefit of creditors under the general assignment act (L. 1877, c. 466, § 20), cannot be discharged without an accounting, even where there has been a composition between the assignor and his creditors, unless the creditors distinctly waive the accounting.*

A composition deed providing that after the payment therein stated had been made, the assignee might apply to the court for his discharge without notice to the compounding creditors, does not justify the court in granting his discharge without any accounting. Before an assignee can be discharged under the provisions of a composition deed, he must perform every condition precedent.

Hence, where such a deed provided that the assignee, after paying all claims which he was liable to pay as assignee, and deducting his fees, might reassign to the assignor the property which might be in his possession under the assignment, and then apply *ex parte* to the court for his discharge, but with the consent of the assignor he obtained the order for his discharge before making the reassignment:—*Held*, that the assignor could not waive the reassignment, and that the order was irregular.

The provision in such a deed ratifying and confirming all the acts, transactions, payments, and proceedings of the assignee, means when he shall have complied with the conditions of the deed by reassigning the property, and is in a position to procure his discharge in the mode provided by the statute.

It is the duty of the court to see that the rights of all the creditors are protected before discharging the assignee.

Appeal by an assignee from an order vacating an order discharging him and his sureties from liability by reason of the assigneeship.

On January 15, 1878, John H. Horsfall made an assignment to John W. Hesse, who qualified and entered upon his duties as assignee, and who was also a creditor of Horsfall for more than \$10,000.

* See Ludington's Petition, p. 307 of this vol.

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The assignee continued the business of the assignor, which was that of manufacturer of cabinet furniture, in the city of New York, from January 15, 1878, to May 10, 1878.

In the month of March negotiations were begun on the part of Horsfall to compromise his debts.

The assignee, being next to the largest creditor, was first approached, and his consent sought to a settlement at twenty-five per cent. cash.

The negotiations for a settlement with the assignee were conducted by Horsfall and one Thomas W. Harris, who was engaged by Horsfall to perfect the settlement. Mr. Harris also represented one Samuel Ellis Briggs, the largest creditor and a personal friend of Horsfall.

These negotiations consumed several weeks, the assignee at first refusing to entertain the proposition to settle at twenty five per cent. Various propositions were discussed and forms of composition deeds submitted, but finally the assignee agreed to sign the composition on condition that Horsfall would waive a public accounting. This condition was acceded to, and Harris, Horsfall and Briggs, of the one part, and Hesse of the other, verbally agreed that there should be no public accounting. Thereupon, on or about April 8, 1878, Hesse signed the composition deed, which, executed by the assignor, party of the first part, and assignee, party of the second part, and the creditors of the assignor, parties of the third part, after the formal recitals proceeded as follows: "The parties of the second and third parts do each hereby agree to accept from the party of the first part a sum equal to twenty-five cents for each and every dollar of their respective claims against said party of the first part, in full settlement of said claims, the said sum to be paid on or before the 10th day of May, 1878. And the parties of the second and third parts do, and each and every of said parties does hereby

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agree to and with the party of the first part and with each other, that on making such payment the party of the first part shall thereupon be forever released and discharged from any and all liability whatsoever to the party of the second part, the said parties of the third part or any of them. And it is further mutually agreed by and between all the parties to this agreement, that upon the signing and sealing of this agreement and its delivery duly acknowledged to said party of the second part, he may re-assign to the party of the first part all property of whatsoever nature or description which may be in his possession by virtue of said assignment, but before making such re-assignment said party of the second part shall, out of said assigned estate, pay all claims or demands against said assigned estate, which he, as such assignee, shall have become liable to pay, and said assignee shall retain out of said estate to his own use the sum of \$200, as and for his fees as such assignee.

"And the parties of the first and third part do hereby ratify and confirm all, each and every, the acts, transactions, payment and proceedings of the said party of the second part as such assignee, and do hereby mutually consent and agree that said party of the second part be relieved and discharged from his trust as such assignee, and from all liability as such, that the bond given by him as such assignee be canceled and annulled, and that the sureties upon said bond be relieved from all liability thereupon, and that an order discharging said assignee, canceling said bond and relieving said sureties may be made by any judge of the court of common pleas for the City and County of New York, sitting as County Judge, upon application of the said party of the second part, without notice to any party to this agreement."

This deed was then circulated among the creditors, and was signed by them, on or before May 10, 1878.

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Shortly before that date, Horsfall was anxious to get back his estate in order to meet his settlement with the funds in the hands of the assignee, but the latter insisted upon the entry of an order of discharge before he would reassign the property. This was finally acceded to by Horsfall, and an order was, upon the petition of the assignee, obtained *ex parte*, from Mr. Justice VAN BRUNT on May 10, 1878, "That said John W. Hesse, and Herman Colell, and William Baltes, the sureties of the said bond of the said assignee be, and they hereby are relieved and discharged from all liability incurred by virtue of their said suretyship to said creditors and each of them, and that said bond be canceled, and that the clerk of this court be, and he hereby is directed to make such suitable entry of such order in the book or books which he may have, in which the filing of the said bond is recorded, and upon the said bond, as will fully carry out the provisions of this order."

This order was filed the next day before the creditors were paid.

On the morning of the latter day, Hesse gave up possession as assignee to the assignor, and paid over to him the sum of \$641.

By borrowing \$1,600 of his creditor Briggs, Horsfall was enabled to carry through his composition as to the bulk of his smaller business creditors, but was unable to pay Briggs and another creditor, one John T. Camp.

In the latter part of the same month, Horsfall made a motion to vacate the aforesaid order of discharge as irregular and void, on the ground that it directed the discharge and release of the assignee and his sureties absolutely, and not upon condition of the assignment of the assets, and that it directed such discharge and release before an accounting was had, and before the assets were reassigned to the assignor. He also asked

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that the assignee account and pay over whatever should be found due.

Judge VAN HOESEN wrote an opinion, holding the order irregular and contrary to the statute and the practice, but as it only released the assignee from liability to creditors, and as Horsfall was not injured thereby, refusing to vacate it.*

* The opinion referred to in the text was as follows:

VAN HOESEN, J.—Any proceeding under the Assignment Act of 1877 may be reviewed in the same manner as any proceeding in a court of law or in equity (§ 25, General Assignment Act of 1877). In an ordinary action the court may, upon motion, set aside any order made by a judge out of court (*West Side Bank v. Pugsley*, 12 *Abb. Pr. N. S.* 28; *S. C.*, 47 *N. Y.* 368). The order which Horsfall moves to set aside was made by a judge out of court, and the only question before me is whether or not it is erroneous. The order provides that the assignee and his sureties be relieved and discharged from all liability to the creditors of Horsfall, and that the bond of the assignee be canceled. The order was founded upon the consent of the creditors, there not having been any accounting by the assignee. It does not purport to discharge the assignee and his sureties from their responsibility to Horsfall, the assignor, and it would not, therefore, be an impediment to his demanding and obtaining a complete account.

No creditor now comes forward to ask the assignee to account. The call for an accounting comes from the assignor, and it is he who petitions the court to set aside the order which discharged the assignee and his sureties from their liability to the assignor's creditors. As the assignor is not aggrieved by the order, I shall deny this application, but I should not hesitate for a moment to set it aside, if the application were made by any creditor. There can be no discharge without an accounting, whilst any part of the trust remains unexecuted. Speaking solely for myself, I am prepared to go still further and to say that under no circumstances whatsoever should an assignee be discharged without first having rendered his account.

In this case there was a composition effected between the assignor and his creditors, but the composition agreement has never been fully carried out. Not all the creditors have been paid, and until they are fully paid, their right of action upon their original claims is merely suspended (*Matter of Backer*, 2 *Abb. New Cas.* 379; *Edwards v. Hancher*, 1 *Common Pleas Division*, 111; 16 *Moak*, 458).

It is impossible to say whether or not the assets of the assignor in

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Thereupon, and on or about July 16, 1878, the creditor Briggs made an application to vacate the order complained of and to remove the assignee. This appli-

the hands of the assignee have been or will be properly applied to the carrying out of the composition agreement. The performance of so much of that agreement as the assignee took upon himself to perform is a necessary part of the assignee's duty, and, as a matter of course, he is not entitled to a discharge till his duty has been done. The discharge was entirely premature. The assignee in this case assumes the privilege of deciding for himself that he has done his whole duty, and says, in effect, that he has used up all the assignor's assets in a lawful and proper manner, and that that assertion should put an end to all inquiry.

But the assignor says, on the other hand, that the assignee has either spent unlawfully or he now retains in his hands assets that are requisite and necessary for the carrying out of the composition agreement, as well as other assets which ought to be returned to him after the creditors have been fully satisfied. The very existence of this dispute shows that there can be but one safe course to pursue, and that is to require an accounting. If all the creditors have not been paid, is it the fault of the assignee? Has the assignor made an agreement of composition which he had not the means of performing, or has the assignee wasted the assets, so that he is to blame for the lack of money to carry the composition through? Nothing but an accounting will afford a satisfactory answer. But, as I have said before, no creditor has asked for an accounting, or to set aside the order discharging the assignee and his sureties from liability to Horsfall's creditors, and, therefore, I shall not now set aside that order, erroneous though it be, and contrary to the practice as it unquestionably is. Though upon the papers presented I do not feel justified in setting aside the order, yet the assignee cannot escape accounting. The very excuse he offers for not accounting seems to me to be a conclusive reason why he should account. The assignee was a creditor of Horsfall. His assent was essential to the making of the composition agreement. His claim was a large one, and without his joining in the composition, it could not have been made. He swears and proves by others that he would not consent to the composition until Horsfall agreed that he should not be called to account as assignee. His own version of the transaction puts him in the position of a trustee, who, being also a creditor, uses his power as such to extort from his *cestui que* trust the surrender of the invaluable right of knowing the way in which the trust estate is spent. No court will tolerate such conduct

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cation was also heard before Judge VAN HOESSEN, who rendered an opinion denying the petition of Briggs, holding that he had waived all his rights by being a party to the verbal agreement to waive an accounting, and procuring through Harris the entry of the order in question.*

on the part of a trustee. Such a trustee ought to be removed and forthwith compelled to account.

Under the assignment act of 1877, it is questionable if the court has the power to remove the assignee on the application of the assignor. Section 6 provides for the assignee's removal on his own petition, or upon the petition of a creditor. But independently of the assignment act, there is no doubt of the power of the court to remove the assignee for good cause shown, at any time, by judgment rendered in an action brought by the assignor or any other person interested in the assigned estate. Without expressing myself positively upon the point, I incline strongly to the opinion that the assignee may also be removed upon the petition of the assignor (1 *Barb. Ch.* 578 ; *Quackenboss v. Southwick*, 41 *N. Y.* 117 ; *In re Van Wyck*, 1 *Barb. Ch.* 565 ; 1 *R. S.* 730, §§ 70, 71, 72 ; 1 *Id.* 735, § 102 ; § 25 *General Assignment Act of 1877*).¹

But the creditors, as they are interested in the trust estate, ought to be brought into the court, that they may be heard on the question of the assignee's removal.

As they are not now before the court I cannot remove the assignee, and without removing him I cannot now order an accounting. It seems to me to be another cause for his removal, that, though he professes to have entirely settled the estate, he attempts to put off the day of reckoning by insisting that he cannot be called to account in less than a year.

If his duty is done, what reason is there for prolonging a merely nominal trusteeship for eight months more ?

* The opinion above referred to is as follows :

VAN HOESSEN, J.—It is true that under section 6 of the general assignment act of 1877, a creditor may, upon petition, obtain the removal of an assignee, but it does not follow that the creditor may not, by his own voluntary act, preclude himself from that form of relief. Briggs, the petitioner, has, in my opinion, done so. He was

¹ See also *Livingston's Petition*, 2 *Abb. Pr.*, *N. S.* 1 ; *S. C.*, 84 *N. Y.* 553.

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Thereafter, and on or about October 15, 1878, the above-mentioned creditor, John T. Camp, made a motion to vacate said order of release as irregular and

not acting under compulsion, as Horsfall was in his dealings with Hesse. Hesse used no coercion upon him to compel him to agree not to demand an accounting. His share as a creditor of Horsfall would not have been diminished by Hesse's refusal to sign the composition agreement. Briggs desired the composition agreement signed, because he was anxious to forward the wishes of his friend Horsfall, but he had nothing to lose if it were not signed.

He was entitled to an accounting, but was at liberty to surrender that right. That right he did surrender, knowingly and deliberately, and not only did he do that, he even went to the extent of procuring from Judge VAN BRUNT the order for Hesse's discharge without an accounting. Under these circumstances, and in the absence of fraud, mistake or coercion, I think he ought not to be permitted to ask for the vacating of the order which he himself obtained, and to ask for an accounting which he deliberately waived. Horsfall's position is very different. Hesse was his creditor, and at the same time his assignee. All the other creditors agreed to accept twenty-five cents on the dollar and release Horsfall from his debts. Hesse's consent was all that was needed to make the composition valid and effectual. If he signed the composition Horsfall could obtain a release from all his debts. If he did not sign Horsfall could not effect a composition. Under these circumstances Hesse said: "I will not sign the composition agreement unless you agree not to ask any questions as to what I have done with the assigned estate, and unless you also agree to ratify and confirm everything I have done since I have been assignee." Nothing more scandalous than this could be proposed by an assignee. Horsfall consented to Hesse's terms. An agreement so extorted cannot stand. A trustee cannot be permitted to save himself from accounting by using his power as a creditor of his *cestui que* trust to coerce the latter to consent not to inquire what disposition has been made of the trust estate. Horsfall has his remedy, whether by bill in equity or by a petition it is not now necessary to decide (*People v. Norton*, 9 *N. Y.* 176).¹ The order of May 10, 1878, having been made by a judge out of court, may be vacated by the court upon notice (*West Side Bank v. Pugsley*, 12 *Abb. Pr. N. S.* 28; 8 *C.*, 47 *N. Y.* 368, 372). There is absolutely no force in the argument

¹ Compare *Shipman's Petition*, 1 *Abb. New Cas.* 406; *Matter of Le Blanc*, 4 *Id.* 221, and see note at the end of this case.

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void, and for the removal of the assignee and for an accounting. After argument, Judge LARREMORE vacated the order on or about November 23, 1878.*

From this order of Judge LARREMORE, the assignee and Herman Colell, one of his sureties, appealed.

Louis C. Wachner (*Lawrence & Wachner*, attorneys), for the assignor, appellant.—One of full age, acting *sui juris*, can waive a statutory or even a constitutional provision in his own favor, affecting simply his own property or alienable rights, and not involving considerations of public policy (*Phyfe v. Eimer*, 45 *N. Y.* 104; *Broom's Maxims*, 310, 547; *Conkling v. King*, 10 *N. Y.* 446; *Goit v. National Protection Ins. Co.*, 25 *Barb.* 191). The petitioner is estopped, by his consent to the entry of the order of May 10, from questioning its provisions, and from claiming an accounting as a condition of its entry (*L.* 1878, c. 318, § 6; *Boerum v. Schenck*, 41 *N. Y.* 182; *French v. Shotwell*,

of Hesse's counsel that Hesse became entitled to a discharge as soon as the composition agreement was signed. If that were so, then Hesse might have been discharged, even though he should have misappropriated the whole assigned estate. It was his duty to turn over that estate to the person entitled by that agreement to receive it, and he is bound to show that he did so. The effect of the counsel's argument is that that agreement would cover a breach of trust all over like a cloak.

That view of the law I am not yet prepared to adopt. When Horsfall makes the proper application to the court the composition agreement may prove to be a very poor shield for Mr. Hesse.

* The following opinion was delivered by the learned judge on vacating the order.

LARREMORE, J.—The question of the validity of the order of May 10, 1878, has already been decided by Judge VAN HOESEN, who held that he should not hesitate for a moment to set it aside if an application to that effect was made by any creditor.

Camp, the petitioner in this application, is a creditor within the ruling above referred to, which, while it stands unreversed, should not be disregarded.

Motion granted.

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5 *Johns. Ch.* 555 ; *Lansing v. Eddy*, 1 *Id.* 49 ; *De Long v. Stanton*, 9 *Johns.* 37 ; *Hamel v. Grimm*, 10 *Abb. Pr.* 150). A rehearing will not be granted after a decree has been entered by consent (*Coster v. Clark*, 2 *Chan. Sct.* 38 ; affi'g 3 *Edw.* 405 ; 2 *Ves. Sen.* 488 ; *Ambl.* 229 ; *Monell v. Lawrence*, 12 *Johns.* 521). The petitioner has no claim whatever, either in law or equity, against the assignee.

George C. Lay, Jr., for John T. Camp, respondent.
—The assignee should not be discharged without an accounting. See following cases recently decided in this court: *Matter of Cottlow*, June 12, 1878 ; *Matter of Yeager*, June 25, 1878 ; *Matter of Dryer*, June 30, 1878 ; *Matter of Horsfall*, July 9, 1878 ; *Matter of Lowenthal*, October 10, 1878 ; *Matter of Groencke*,* Dec. 23, 1878. The court at special term has power to vacate and set aside an order made out of court (*West Side Bank v. Pugsley*, 47 *N. Y.* 368, 372 ; also

* The MATTER OF GROENCKE, *N. Y. Common Pleas, Special Term*, December 23, 1878, was a motion for the discharge of an assignee for the benefit of creditors, made by George Groencke, the assignor, and Richard L. Plahn, the assignee, for the discharge of the latter as assignee and that he should restore any assets remaining in his hands to the assignor, and also for the discharge of his sureties.

It appeared from the affidavits of the applicants, that the assignment had been made August 29, 1878, and thereupon all creditors were notified to meet, which they did, and all executed a composition deed under seal, but not witnessed or acknowledged, by which they agreed to discharge the assignor from all their claims against him upon the payment of twenty-five per cent. thereof.

This percentage having been duly paid, this application was made upon personal notice to the creditors.

Judge VAN HOESEN, in denying the motion, delivered the following opinion, December 23, 1878.

VAN HOESEN, J.—Motion for a discharge of the assignee denied. The assignee must advertise for claims. We never discharge without such an advertisement. Besides, there can be no discharge without an accounting. These *ex parte* proceedings for a composition may be right ; no one can tell ; but no discharge can be obtained upon them.

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opinions of VAN HOESEN, J, in this matter). The order of release was premature and has not the force of a decree entered upon consent. An agreement *extra curiam* containing a consent cannot be made the authority for a decree in a court of justice, except in accordance with some statute upon the subject. The only two cases in this State where judgments are recorded in the courts without suit and upon written agreement are, judgment upon forfeited recognizances and statements for confession of judgment (3 R. S. [6th Ed.] 774; *Code of Civ. Pro.* § 1273, *et seq.*).

DALY, Ch. J.—The order vacating the order discharging the assignee should, in my opinion, be affirmed. The statute has provided for the mode in which an assignee in an assignment for the benefit of creditors under the statute, where there has been a composition between the assignor and his creditors, may be discharged, which is on a proceeding for an accounting under the act (*Laws of 1877*, c. 460, § 20). It was, undoubtedly, as the appellant claims, within the power of the creditors to waive the accounting, for a party may waive any provision of law, or statutory or constitutional enactment designed for his benefit or protection.

But the creditors in this case have not by the composition deed waived an accounting. The assignor and the creditors, Briggs & Harris, who, together, brought about the composition, did so with the assignee, and the application of the assignor Horsfall, and of Briggs, to vacate the order discharging the assignee, was denied by Judge VAN HOESEN, in the case of Briggs, upon the ground that he had, by the verbal agreement, waived his right to an accounting.* But the petitioner Camp was no party to this verbal agreement, and is in no way concluded by it. He is simply one of the credi-

* See opinion of VAN HOESEN, J., on p. 295, *ante*, *note*.

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tors who signed the composition deed; and all that they agreed to was that an order might be made by any judge of this court, discharging the assignee without notice to them.

The assignee was entitled, under this agreement, to apply to any judge of this court for his discharge without notice to the creditors who signed the composition deed; but the only mode in which the court had power to discharge him, was upon proof of the composition in a proceeding for an accounting. When the creditors consent that an order may be made by any judge of the court discharging the assignee, they necessarily mean, discharging him without any notice to them, in the manner prescribed by law, there being no other way in which a judge could discharge him.

To constitute a waiver the consent should have been without any accounting.

The *ex parte* order, therefore, discharging him, was irregular and was properly vacated.

It was provided by the composition deed, that after the execution and delivery of it, the assignee might, after paying all claims and demands against the assigned estate which, as assignee, he was liable to pay, and after deducting \$200 for his fees, reassign to Horsfall, the assignor, the property, of whatever nature or description, which might be in his possession under the assignment.

It is very clear from the instrument, that he was to do this before he had the right to apply to a judge of the court to be released and discharged from his trust.

The composition creditors had agreed to release and discharge the assignor from all liability upon the payment by him of twenty-five per cent. of the amount of their respective claims, and the reassignment of the assigned estate to him by the assignee, as provided for in the instrument, was clearly necessary to enable the assignor to carry out the composition; for it is to be

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assumed, as this was a general assignment of all the debtor's property for the benefit of creditors, that he had nothing to enable him to pay the compounding creditors until the property was restored to him by a reassignment; and this is sworn to have been the fact, by the assignor and by Briggs, who was one of the principal creditors.

But the *ex parte* order discharging the assignee was made with the consent of the assignor before a reassignment of the property, and was for that reason alone irregular. This was not a provision which the assignee could waive, except so far as his rights were concerned. The composition creditors had rights also. It was for their interest that the assignor should be enabled, as speedily as possible, to carry out the composition, as the payments were to be made in about a month after the execution of the composition deed; and the assignor could not, without their consent, agree so as to bind them that the assignee might be discharged before reassigning the property. The provision in the composition deed ratifying and confirming all the acts, transactions, payments and proceedings of the assignee means, when he had complied with the conditions of the deed by reassigning the property, and is in a position to procure his discharge in the mode provided by the statute. From the facts disclosed, an accounting in this case was necessary, as the assignee, if he has done what is alleged, has impaired the estate and lessened the ability of the assignor to comply with the terms of the composition. The opinions delivered by Judges VAN HOESSEN and J. F. DALY, in the assignment cases * of Cottlow, Yeager, Dryer,

* The cases here referred to are as follows:

In the MATTER OF COTTLOW (*N. Y. Common Pleas, Special Term, June, 1878*), above referred to, it was held that the court will not order a reference to pass on objections filed by a petitioning creditor to an account filed by the assignee, without bringing in the other creditors. In that case an *ex parte* application was made to the court for a refer-

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Lowenthal, and by Judge VAN HOESEN, in the application of Horsfall and Briggs, in the present case, show how essential and indispensable it is that there should be an accounting in every case, and that it

ence to take proof of all matters relating to the account of Morris Leon, assignee for the benefit of creditors of Louis Cottlow.

The affidavit on which the application was based was made by the attorney for one of the creditors of the assignor, and stated that the said creditor, Emanuel Schwerin, had obtained an order directing the assignee to file his account, and that the said assignee had complied therewith, and the petitioner had filed his objections to said account. That this accounting was not final, but ordered only on the petition of said Schwerin, and that no other creditor had appeared therein.

The attorney for the assignee consented to the entry of the order of reference.

The following is the opinion of the judge, denying the application for the order, June 12, 1878.

VAN HOESEN, J.—I deny this application. No such proceeding will ever receive any sanction from this court. Mr. Schwerin and Mr. Leon may propose, but they will not be permitted to dispose.

Let Mr. Leon do what he ought to do—apply for a general citation. The only effect of such an application as this is to arouse suspicions—suspicions which may be unjust and unfounded—as to the good faith of the parties to it.

Mr. Leon cannot hold his accounting secretly and slyly, with my consent.

In the *MATTER OF YEAGER (N. Y. Common Pleas, Special Term, June, 1878)*, above referred to, it was held that the court will not discharge the assignor and his sureties after a composition by all the creditors, unless there has been an accounting. A petition was presented to the court by Henry Eisner, assignee of Israel Yeager and Seligman Bauer, asking leave to reconvey to said assignors the assigned property, and that he and his sureties be discharged. The application was founded upon a compromise agreement signed by all the creditors, and containing their respective receipts for their dividends, and their written consent that the assignee reconvey to the assignors the assigned property. It appeared that no notice to creditors to present their claims to said assignee had been published.

Judge VAN HOESEN, in denying the application, delivered the following opinion, June 25, 1878.

VAN HOESEN, J.—On this application the release can only be from

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cannot be dispensed with unless there has been a clear, distinct and undoubted waiver of it by every creditor who could in any way be affected by the assignee's discharge, which was not the case here.

liability to the compounding creditors, who appear and who have been cited to appear on this application. If the bond is to be canceled and the sureties discharged there must be an accounting. It will be merely formal, perhaps, but it must be had. The court will not discharge the bond, except after an accounting.

In the MATTER OF DRYER (*N. Y. Common Pleas, Special Term, June, 1878*), above referred to, it was *held* that the court will not even order a discharge *pro tanto* without an accounting. The case was an *ex parte* application by John D. Wienholz, an assignee, for benefit of creditors of William Dryer, for an order relieving him on account of a general release.

The creditors of the insolvent had agreed by an instrument in writing, signed and sealed by each one in the presence of a subscribing witness, who duly acknowledged the same, to accept a sum equal to twenty-five per cent. of their claims in full satisfaction thereof.

The assignor having complied with the terms of the agreement, the creditors also signed and sealed a general release, dated February 20, 1878, in the presence of a subscribing witness, who duly acknowledged the same.

On June 5, 1878, the assignee obtained an order for a citation to issue for the creditors to attend a final accounting on June 15, 1878, and all the creditors were duly cited accordingly.

Pending this proceeding for an accounting, the assignor applied for an order relieving him from any further liability on account of his trust as assignee, in so far as the same might be affected by the claims of any creditors whose names appeared upon the general release, and also for the release of his sureties.

Judge VAN HOESEN, in denying the application, delivered the following opinion, June 30, 1878.

VAN HOESEN, J.—There can be no discharge without an accounting. Experience has shown the absolute necessity for the giving, by the assignee, of an account of his stewardship. I have now before me a case apparently like this, in which an assignor joined with the assignee in petitioning for the discharge of the assignee's sureties, and where after such discharge the assignee retained and refused to surrender to the assignor the surplus remaining in his hands.

I will not sign any order for a discharge *pro tanto*. Let the assignee make his account, show that his duty has been done, and that

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I do not think that it affects the question whether the petitioner may have been tendered the amount of the composition or not, if the discharge was irregular. He was not, as Briggs was, concluded by any agreement on his part to waive an accounting, and had the right to bring the matter before the court, it being the duty

nothing remains to be done, and then, upon turning over to the assignor the balance in his hands, a discharge will be granted.

In the *MATTER OF LEWENTHAL* (*N. Y. Common Pleas, Special Term, October, 1878*), it was *held* that on the final accounting required under these rules, all creditors, even though they have signed releases must have notice, and advertisement for claims must have been made. A petition was made by M. Petshaw, assignee of Raphael Lewenthal and Max Gabriel, for his discharge as assignee.

The petition of the assignee stated the making of the assignment, filing of inventory and bond, and that all the creditors had proved their claims. Also that a compromise by deed had been effected between the assignors and their creditors, and that all the latter had executed releases to the former.

Affidavits of the assignors confirming the statements of the assignee accompanied the petition.

The assignee asked to have his accounts referred to an auditor to examine the same and to take proof of the several matters referred to in his petition and to report thereon to the court, together with his opinion as to the amount to be paid to counsel, and the amount due to the petitioner for commissions, and that thereupon he should be discharged and his sureties released.

Judge J. F. DALY, in denying the application, delivered the following opinion, October 10, 1878.

J. F. DALY, J.—No discharge will be granted the assignee except upon a proceeding for an accounting to be instituted by citation. The statute is clear upon this point. The assignee must apply by petition for a citation to all persons interested in the estate, to attend the settlement of his accounts, and all parties, whether they have signed releases or not, must be notified.

Advertisement for claims must be made where the assignee seeks relief by reason of a compromise between the assignor and the creditors.

As to necessity of advertising for claims, see note at the end of the principal case.

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of the court to see that the rights of all the creditors are protected before discharging the assignee.

The order, therefore, should be affirmed.

J. F. DALY, J.—[Concurring.]—That the proceedings of the assignee to procure his discharge were wholly irregular, and the decree or order discharging him was unauthorized by law, the chief justice points out clearly in his opinion.

The interest of the petitioner Camp in the matter is that he is to be bound by such unauthorized decree. He is made a party to the proceeding to the extent of having his claims barred. Whether, owing to his release and waiver of notice under seal, he would be permitted, in a regular proceeding, to be heard in opposition to the assignee's discharge, is a totally different question from the one before us. He certainly is not barred from claiming that the judgment cutting him off is not authorized by law.

VAN BRUNT, J.—[Dissenting.]—In order to entitle a party to seek the intervention of the court it must appear that he has some rights which he is entitled to enforce or some grievance which he has the right to have redressed. If any other rule were to prevail every stranger who should find what he might think to be an improper or improvident order or proceeding upon the files of the court would have the right to come in and claim the attention of the court as to matters in which he has no possible interest.

Therefore, if it should appear that Mr. John T. Camp, the moving party upon this application, could not have, under any possibility, any interest in the assigned estate, or if an accounting were ordered could not possibly be heard upon that accounting, and that he has released every claim that he has against the assigned estate, and has formally released by an instrument under seal for a sufficient consideration, the

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assignee from each and every claim which he might have against him, it is of no consequence what the nature of the order complained of in this proceeding may be, Camp should not be allowed to make any application in respect thereto, as he has no right to enforce or no grievance to redress. [The learned judge here stated the substance of the agreement, and then proceeded as follows:]

This agreement is under seal which imports a consideration, and is valid and binding upon all the parties to it, and its validity could not be impeached upon the motion under review.

It is to be observed, that the composition between the assignor and his creditors contained in this agreement is entirely independent of and distinct from the covenant and agreement included therein between the assignee and the creditors of the assignor. The creditors agree separately with the assignor that upon the signing and sealing of this agreement the assignee may *reassign*; not shall reassign, but may reassign all property, &c., to the assignor.

And then the agreement proceeds to say that the assignor and his creditors do hereby ratify and confirm all the acts and proceedings of the assignee, and that they do hereby mutually consent and agree that the assignee be relieved from all liability as such, and his sureties discharged, and an order be entered without notice to that effect.

Here is an absolute release to the assignee, signed by each and every creditor upon a sufficient consideration, whereby they have mutually released every claim which they and each of them had against the assignee or the assigned estate; and it is to be observed that this release is not predicated upon the fact that the assignee will reassign the assigned property to the assignor, but is entirely independent of and distinct

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from it. The release is absolute. The assignee may reassign.

It is clear that no creditor who has that agreement could possibly raise any question upon any accounting which the assignee might be called upon to make. They would, each and every of them, after this formal release of the assignee, be precluded from raising any objection to any of his acts or proceedings.

If for any reason any party had the right to rescind this agreement, he must bring his action for that purpose. Such a question could not possibly be tried upon an accounting.

It then clearly appears that Mr. Camp had no interest whatever to be protected by this motion, and for that reason his motion should have been denied.

I think the order appealed from should be reversed.

Order affirmed.

LUDINGTON'S PETITION.

N. Y. Common Pleas. Before AUSTIN ABBOTT, Referee, July, 1878.

ASSIGNMENT FOR BENEFIT OF CREDITORS.—GENERAL ASSIGNMENT
LAW.—LIABILITY OF ASSIGNEE TO ACCOUNT.—
NEGLECT TO ADVERTISE FOR CLAIMS.

The history of the law as to voluntary assignments for benefit of creditors, and the analogy between the policy of the general assignment act and the statutes regulating the administration of decedents estates,—considered.

An assignee who has taken possession of assets under an assignment duly acknowledged and recorded, is liable to account in respect thereto, although no bond and no schedule of creditors has been filed,* and no designation of creditors was made in the assignment, and the assignor and assignee may have regarded the assignment as inchoate and incomplete.

* To the same effect is *Matter of Farnum*, 14 Hun, 159.

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Under the general assignment act, an assignee, who has surrendered the assets without authority of the court, pursuant to a composition to which all known creditors were parties, is nevertheless liable to account to a creditor not joining in the composition.

An assignee who accepts an assignment, covenanting to fulfill the trust, is not exonerated from accounting to an unpreferred creditor by the mere facts that the assignment contained a preference, and an assignee in bankruptcy has been appointed.

A creditor by proving his claim in bankruptcy, disclosing the fact that the bankrupt has made a general assignment for benefit of creditors, but without expressly releasing or surrendering his claim under that assignment, and without any act or election on the part of the assignee in bankruptcy, is not precluded from citing the assignee under the voluntary assignment, to account in the State court.

A judgment upon the merits, recovered against the assignor even after the assignment was made, in an action fully litigated and deliberately and intelligently decided by a competent court, is, as against the assignee, on a petition for an accounting, conclusive evidence of the fact and amount of the assignor's indebtedness established thereby, on a cause of action existing before the assignment, unless fraud or collusion is shown.

An assignee who never advertised for claims is not exonerated from accounting by the fact that in ignorance of the petitioner's claim he joined in a composition made between all creditors known to him with the assignor, and surrendered all the assets pursuant thereto.*

Where there is no advertisement for claims under the statute, a creditor is not charged with notice of the assignment by the mere fact that it was recorded, so as to lose his claim by failure to present it because of ignorance in fact; but the assignee is bound to ascertain all the debts due from the assignor within the terms of the trust, at the peril of liability in respect to claims which he overlooked because they were unknown to him.

Petition for an accounting.

The facts were found as follows :

I. On March 18, 1876, a resident of the city of New

* For cases of agreement of assignee to settle, compound, or compromise with other creditors at his own risk, see *Goldenbergh v. Hoffman*, 69 *N. Y.* 322; *aff'g 7 Hun*, 324; *Brown v. Curran*, 14 *Id.* 260 (a questionable authority); and *Barlow v. Myera*, 64 *N. Y.* 41 and cases there cited.

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York, being indebted to various persons, made a general assignment for the benefit of creditors to the defendant. The assignment was signed by both assignor and assignee, and acknowledged by both, on March 18, and was recorded on March 20, 1876. The assignment was in trust to sell the property and convert it into money, and to collect the debts; and with the proceeds of such sales and collections to pay a preferred creditor a debt of \$350; with the residue of the proceeds, to "pay and discharge all the several and respective debts, bills, notes and sums of money due or to grow due from the party of the first part to any and all persons, parties and firms, now due and owing by the party of the first part and designated in the schedule to be made and filed in connection with this assignment, together with such interest as may accrue thereon; and if such net proceeds and avails shall not be sufficient to pay the same in full, then such net proceeds and avails shall be distributed *pro rata* among said persons, according to the amount of their respective claims." The instrument contained the usual covenant on the part of the party of the second part to the effect that he "hereby accepts the trust created by these presents, and covenants that he will faithfully perform the same."

II. The assignee took possession of assets of the assignor, embraced by the assignment, to the value of \$6,000.

The assignor appointed an attorney in fact, or agent, and left him in charge and control of the assets, and this agent received whatever avails or proceeds were shown to have been realized by sales or collections between the time of the assignment and the assignee's transfer, hereafter mentioned.

III. No bond was ever given by the assignee, and no inventory or schedule, either of assets or creditors, was ever filed under the assignment, and none was ever verified by the assignor.

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IV. The assignor furnished to the assignee a list of those whom he regarded as his creditors, and it did not include the petitioner; and the assignor never informed the assignee that the petitioner claimed to be a creditor.

V. On or about October 14, 1876, the assignor negotiated a compromise with certain of his creditors, including all or nearly all that he regarded as such, giving his notes to them for an amount about equal to the value put upon the assets which had come to the possession of the assignee; thereupon the assignor gave a bill of sale to his wife, of all the assets in the store, together with the good-will of the business, and the lease, the consideration named being \$17,000.

VI. The defendant, the assignee, at the same time, by an instrument of even date with said bill of sale, and reciting the general assignment that had been given by the assignor, and reciting that the assignor had fully settled with and paid all his creditors on terms accepted by them, and that, by reason of such settlement, he was entitled to have the control of the assigned estate; and that he had given said bill of sale to his wife, assigned and transferred to her in consideration of the premises, and of one dollar, the assets embraced in the assignment.

VII. Before the execution of the assignment, the petitioner commenced an action in the New York superior court, against the assignor and a former partner of the assignor. The action was brought to trial after the assignment had been made and recorded, and after the transfer of assets above stated. The cause of action was the balance due on a firm note which had been given in renewal of an individual note of the defendant, the assignor. The merits of the action were fully litigated by the petitioner and the assignor; and upon the evidence it presented a question of law for the court, which was deliberately and intelligently de-

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cided ; and the petitioner as plaintiff, by direction of the court, recovered a verdict against the defendant, the assignor, on December 22, 1876, on which, after the hearing of exceptions at the general term, judgment was entered by direction of the general term on November 23, 1877, in favor of the petitioner and against the defendant, the assignor, for the sum of \$2,545.56.

VIII. An appeal from this judgment to the court of appeals has been perfected by the defendant.

IX. On November 30, 1877, shortly after the entry of this judgment, the assignor was adjudicated a bankrupt, and an assignee in bankruptcy was appointed.

X. On December 21, 1877, in the bankruptcy proceedings, the petitioner proved his claim as consisting of said judgment, referring in his proof of claim to the general assignment aforesaid, as the only security he had received, and stating that in his opinion such security was of no value.

XI. On December 28, 1877, the present petition was verified, and on December 29, the order requiring the assignee to show cause why he should not account, was made.

XII. The claim of the petitioner, and the other claims proved on the bankruptcy proceedings, were claims that had not been included in the compromise of October 14.

XIII. There was evidence that other persons than the petitioner now claimed to be creditors of the assignor.

XIV. There was no evidence that the petitioner was ever informed of the general assignment until the proof in bankruptcy, dated December 21, 1877. Nor was there evidence that the defendant, the assignee, has ever advertised for claims, nor that he was ever informed that the petitioner was, or claimed to be, a creditor, until the service of the order to show cause.

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Nor that the assignee in bankruptcy ever acted as such in any manner in reference to this estate or assignment.

George W. Lord, for petitioner.

Birdseye, Cloyd & Bayliss, for respondent.

AUSTIN ABBOTT, Referee.—The petition recites a general assignment for benefit of creditors, and that the petitioner is a creditor of the assignor and interested in the distribution of the proceeds; and asks an account of the trust fund and a decree directing payment of his proportional part.

The objections of the assignee involve several questions on the construction of the statute which depend, in part, upon the history of the law of assignments and of their judicial supervision, which it will be more convenient to notice first before passing on the specific objections.

At common law, and before the recent modifications which equity and more lately the statute regulations have introduced, an assignee for the benefit of creditors was but the hand of the assignor in the distribution of his estate (*Re Fulton's estate*, 51 *Penn. St.* 204, 211; *Marbury v. Brooks*, 7 *Wheat.*, 556, 579); except where, as has been usual in England and in some of our States, the assignment requires an express assent on the part of creditors, which being manifested, it partakes of the nature of a compromise or composition. By our law the assent of creditors is presumed, in the absence of evidence to the contrary, from the beneficial nature of the trust; and it was finally established before the subject was regulated by statute that the assignee was, both at law and in equity, a trustee for the benefit of all non-dissenting creditors who were within the terms of the assignment.

In proportion as this doctrine became fully established, the want of a convenient procedure by which the assignee might be both held responsible, and pro-

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tected as a trustee ; by which he might compel a disclosure of concealed assets ; might ascertain, with sufficient certainty to protect himself from mis-payments, who were creditors ; and by which he might on the one hand be required to account and on the other hand might have his accounts adjudicated, without the expense of a bill in equity. These, with other considerations of policy for the prevention of fraud, led to the adoption of the act of 1860 and its subsequent amendments, which were consolidated and revised in the general assignment act of 1877.

The policy of this legislation has been, not to embarrass the right of making such assignments, but to secure publicity, by acknowledgment and record, and to subject the assignors and their estates, from the time of the making of the assignment, to the summary jurisdiction of the court ; to require the assignee to give security promptly, as a condition of his power to convert and apply assets under it ; to authorize the assignee to gain possession of all the assets, by compelling the debtors to make discovery, if they fail to make a schedule of assets ; and to authorize the assignee to ascertain who claim as creditors, by advertising for claims and requiring verified vouchers ; lastly, to provide a simple and direct method of accounting, modeled upon that provided for executors and administrators.

For these purposes the statute has subjected the assigned assets and the parties to the assignment from the moment of its record, to the jurisdiction of the county court, which is vested therefor, with powers similar to those exercised by surrogates, and further equity powers.

The various modifications of the amending and revising statutes carry out this purpose within these general lines ; and the settled practice in administering the estates of decedents is a proper guide in the interpretation and application of analogous provisions in

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these statutes (Gifford v. Black, 22 Ind. 444); especially under statutes like ours, which repeatedly refer to the powers of surrogates, and the forms of proceedings before surrogates, as a guide (see *General Assignment Act of 1877*, § 17, subd. 9; see also *L. 1860*, c. 348, § 4; *L. 1867*, c. 860, § 4; *L. 1870*, c. 92, § 1; *L. 1872*, c. 838, § 1; *L. 1875*, c. 56, § 2; same statutes, *Keiley*, 4, 6, 18, 16).

I. The first objection to the petitioner's proceedings is that the petition is not sufficient. It is urged that if this proceeding is had under the act of 1877, it cannot be sustained, because the former statutes, under which this assignment was made, are repealed (*L. 1877*, § 28), and that this proceeding never was pending under the former statutes, and therefore is not within the saving clause; while, if the petition be regarded as filed under the former statutes, it is not sufficient for not stating the particulars required by the act of 1872 (*L. 1872*, c. 838, amending § 4 of *L. 1860*; *Keiley*, 10).

The repealing clause declares that the act of 1860 "and the several acts amendatory thereof are hereby repealed, but this shall not affect any proceeding had; and any proceeding pending under the acts hereby referred to, may be continued under this act" (*L. 1877*, § 28).

The theory of the first branch of the objection above stated, is that each petition in reference to an estate forms a new and distinct proceeding; and that by the repeal of the act of 1860, and its amendments, the jurisdiction of the court over each estate fell, except so far as it may have been saved by the pendency, at the time the repeal took effect, of a petition or other such proceeding in reference to the estate.

I am of opinion that in contemplation of law the entire subject of an estate is one proceeding, within the meaning of the saving clause; and commences with

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the record of the assignment, and continues until the final settlement. The policy of the law, as we have seen, is to place the whole estate under the direction of the court; its jurisdiction is acquired by the filing of the assignment (act of 1877, § 25, last clause); and in some cases the judge may on his own motion, require an accounting (§ 11, last clause).

This view is confirmed by the language of section 2 of the act of 1874, chapter 600 (*Keiley*, 15); which declares that section 1 "shall apply to all cases of assignment heretofore made . . . which are now depending unsettled."

But if the petition were treated as if filed under the former statute, it would be sufficient; for the details prescribed by the act of 1872, were dispensed with by *L.* 1875, chapter 56, section 2, amending section 4 of the act of 1860 (*Keiley*, 16); and under that act a verified allegation of being a creditor is *prima facie* sufficient (*Burwell v. Shaw*, 2 *Bradf.* 322; *Thomson v. Thomson*, 1 *Id.* 24; *Gratacap v. Phyfe*, 1 *Barb. Ch.* 485).

II. Is the assignment void, or the assignee exonerated from accounting, because no bond or schedules were filed?

It must be regarded as fully settled that the failure to file a bond does not prevent the title from vesting in the assignee. From the time of the record of an assignment which has been accepted by the assignee, if not from the time of its acceptance before record,* the title of the assignor is divested (*Thrasher v. Bentley*, 1 *Abb. New Cas.* 39, and cases cited; *Von Hein v. Elkus*, 8 *Hun.* 516, overruling *Hedges v. Bungay*, 16 *Abb. Pr. N. S.*, 313; *S. C.*, 3 *Hun.* 594; and *dictum* in *Juliand v. Rathbone*, 39 *N. Y.* 369); although

* It is a yet unsettled question whether record is essential to the validity and effectiveness of an assignment under this act, or whether acknowledgment and delivery is enough.

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until bond is given, the assignee has no power to give title by transfer of the assets. (Brennan v. Willson, Ct. of Appeals, 4 *Abb. New Cas.* 279). It is true that the giving of the bond depends on the previous making of inventories; but the statute gives the assignee power to compel a discovery for this purpose, if necessary.

The question as to the right to compel the assignee to account before he has given a bond, has not been determined in any reported case in this State.*

I am of opinion that where it is shown that the assignee has taken possession of assets under an assignment duly acknowledged and recorded, he is liable to account in respect thereto, without regard to whether any bond or schedules have been filed, or whether the assignor and assignee regarded the assignment as complete, or inchoate and revocable. Section 8 of the general assignment act, which provides that "a failure to file any bond required by or under this act, or the acts hereby amended, within the specified time, will not deprive the county judge of his power over the assignee or the trust estate," is declaratory of the principle which would be applicable under the statute, without an express provision. The cases in other jurisdictions upon this question are as follows:

In *Ward v. Lewis*, 4 *Pick.* 518, creditors filed a bill against assignees, alleging that complainants were preferred, and that the assignees had paid the other debts to the exclusion of theirs. Defendants admitted the execution of this indenture, but alleged that it was never intended to take effect until a majority in interest of the creditors should sign, and that it was never delivered by the debtors or creditors as their deed to the assignees; and lastly, that the debtors compounded with their creditors, and that the deed, if it had any

* Determined in same way as above, in *Matter of Farnum*, 14 *Hun*, 159, since reported.

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effect, was thereby rescinded. *Held*, that the conduct of the parties, and the possession of the instrument, raised a presumption of delivery which could not be *in escrow*, because it was made to a party; and that the assignees having taken possession as such, and having had notice of the plaintiffs' claim, were liable to the plaintiffs, but only for assets which they had actually received; and that it was no defense that the assignees had, by mis-apprehension, paid over all the funds to other creditors. In this case there was no statute requirement of bond. Under the general assignment act of Pennsylvania, which gives the power to the court to require an account from assignees under recorded assignments, *held*, that the court may require it not simply from those that may have voluntarily placed themselves under the jurisdiction of the court, by giving bond and filing an inventory, but the test is whether the person called upon to account is an assignee or trustee within the meaning of the statute, and not whether he has performed his duty as such trustee or assignee; and the omission to file a bond or inventory does not, therefore, exonerate him from the obligation to account for assets actually received (Whitney's appeal, 22 Penn. St. 500).

On the contrary, it has been said by the supreme court of the United States, that to oust the jurisdiction of a court of equity, by a plea of proceedings pending in the statutory court, it should appear that the bond, &c., has been filed, because the statutory jurisdiction depends on it (Shelby v. Bacon, 10 How. U. S. 56, 69; disapproved in Whitney's appeal, 22 Penn. St. 505).

III. Is the petitioner confined to remedy by action for an accounting, or may he proceed by petition?

The ground of the objection on this point is, that the person to whom the assignee transferred the assets, and the assignor, should be parties, as well as other

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creditors; while this proceeding is only between the petitioner and the assignee.

No doubt the assignee might bring an action, joining his transferee and the assignor, and those interested, or claiming to be interested in the estate, to recall the assets and have them distributed, and his liability, if any, determined; and although under the former practice such a bill, perhaps, might be obnoxious to the objection of multifariousness, such an action ought to be sustained under the code. The actual pendency of such an action might be a reason for suspending proceedings on such a petition as this, but the proceeding by petition instead of by action is favored (See, for instance, *Bloodgood v. Bruen*, 3 *Bradf.* 8; *Groshon v. Lyon*, 16 *Barb.* 461).

Under the statutes as to general assignments (*L.* 1860, c. 348, § 4, amended by *L.* 1867, c. 860; *L.* 1872, c. 838; *L.* 1875, c. 56; same statutes, *Keiley*, 3, 5, 9, 16), "any creditor," or "any person interested in the estate," may cite the assignee to account, and the same rule is preserved by section 11 of the act of 1877.

It is true that the assignee is entitled to have his entire account settled in one accounting, such as to protect him against all who could claim under the assignment. In an action, the court will enforce this right on an objection for defect of parties (*Bailey v. Bergen*, 67 *N. Y.* 346, rev'g 4 *Sup'm. Ct. [T. & C.]* 642). In a proceeding by petition under the statute, the right is protected by the first clause of section 12, which provides that, "a citation issued on the petition of a creditor may be addressed to and served on the assignee alone, but on or after the return of such citation the assignee may have a general citation issued to all parties interested."

This practice, like others in the proceedings, is borrowed from the law applicable to executors and ad-

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ministrators, under which the rule is the same (*McLellan's Prob. Pr.* 300).

A petitioner, therefore, is entitled to an order for an accounting without joining other creditors, &c., but the assignee may make any others parties for his protection. He is not entitled to require the petitioner to bring an action against the transferee of the assets.

IV. Is an assignee who accepts an assignment for the benefit of creditors, and covenants to fulfill the trust, exonerated from accounting to an unpreferred creditor by the facts that the assignment contains a preference, and that an assignee in bankruptcy has been appointed?

It is not to be questioned that such an assignment is void as against the assignee in bankruptcy (*U. S. R. S.* § 5128), and that it would be so declared in the bankrupt court; and it has recently been held in the supreme court of this state, in *Bostwick v. Burnett*, 11 *Hun*, 301 (opinion by BARNARD, P. J., GILBERT, J., concurring, 1877), that a general assignment with preference is void *per se*, under the bankrupt act, in such sense as precludes the assignee from recovering as such, in an action for the assets or for their conversion.

In the present case it does not appear that the assignee in bankruptcy has taken any steps in relation to the estate.

I am of opinion that the assignee, under a voluntary assignment with preference, is liable to account, in respect to assets which he actually received under the assignment, to a creditor not claiming under a preference, unless and until the assignee in bankruptcy attacks the assignment.

Burrill, after explaining the effect of preference under the bankrupt law, says that in the absence of actual fraud, the assignment, even though constructively fraudulent, is not void, but voidable in bank-

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ruptcy, and is voidable only at the suit of the assignee (*Burrill on Assignments*, 3d ed., 71, § 54). Perry says, that the deed though voidable by creditors and assignees in bankruptcy, is good between the defendants themselves (2 *Perry on Trusts*, 132, § 587). If the provisions of the assignment for the benefit of creditors are contrary to law, and might be set aside on proceedings had for the purpose, yet if all parties proceed under it, the trustees must find their power in the deed of assignment, and must proceed in accordance with it in selling the property, and in paying the debts. The principle is, that so long as the law does not interfere to set aside the assignment, the assignee must follow the only power given to him, to wit—the deed of assignment (2 *Id.* 145, § 597).

The same question arose in *Seaman v. Stoughton*, 3 *Barb. Ch.*, 344, under the bankrupt act of 1841, and the court held that an assignment with preferences is not void as against a bill for an accounting by a creditor, but only as against an assignee in bankruptcy. "It would be contrary to every principle of equity," said the chancellor, "to permit a trustee, who has received the property of a debtor in trust to apply it to the payment of creditors, to set up the defense of fraud, in making and receiving the transfer for the benefit of such creditors, as a defense to a suit brought by them to compel a performance of the trust; without showing that the fund had been recovered from him by the parties intended to be defrauded, or even that they had ever made any claim to it."

The fact that the assignment with preference is voidable, not absolutely null and void, is plain, from the fact that if the assignee had applied the assets pursuant to the provisions of the assignment in good faith, he would be discharged thereby from further liability even to an assignee in bankruptcy, at least as to so much of the application of the assets as did not involve

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carrying the illegal preference into effect (*Burrill on Assignments*, c. 40, §§ 459-462).

A trustee who has received the trust fund and applied it differently from the mode which his covenant and his legal duty requires, cannot avoid the obligation to account, by suggesting a paramount title to which he has not yielded, and which has never been asserted.

V. Does a creditor, by proving his claim in bankruptcy, disclosing the fact that the bankrupt has made a general assignment for benefit of creditors, but without any express release or surrender of his claim under that assignment, and without any act or election on the part of the assignee in bankruptcy, preclude himself from calling the assignee under the voluntary assignment to an accounting in the state court?

It has been much disputed in the bankrupt courts, whether proving a claim *ipso facto* releases to the assignee any security held. The weight of authority seems to be that for the purpose of proceedings in bankruptcy and as against the assignee in bankruptcy, proving a claim without disclosing the existence of a security, waives the right to pursue the security; but that proving upon a disclosure of the security, without any express release by the creditor, or manifestation of election on the part of the assignee to accept the security, does not waive or surrender it (See *Hatch v. Seely*, 13 *N. Bankr. Reg.* 381, 383, and cases cited; *in re Frost*, 11 *Id.* 69, 73; *in re Grinnell*, 9 *Id.* 29, 33; *in re Parkes*, 10 *Id.* 82; *Stewart v. Isidor*, 5 *Abb. Pr., N. S.* 68, 73; S. C., 1 *N. Bankr. Reg.*, 485, 489; *in re Bridgman*, 1 *Id.* 312, 315; *in re Winn*, 1 *Id.* 499; *Merchants' Bank v. Comstock*, 55 *N. Y.* 24; *in re Saunders*, 2 *Low.* 444; S. C., 13 *N. Bankr. Reg.* 164). It is the settled doctrine of the bankrupt courts that in either case the title of the creditor to his security is at least thereafter held at the peril of the assignee's election to take it, or the court's interference

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against its enforcement (*Lee v. Franklin Av. Inst.*, 3 *N. Bankr. Reg.* 53, 218; *Davis v. Anderson*, 6 *Id.* 146).

I should add that it is doubted in this court, and with apparent reason, whether a general assignment for benefit of creditors is a security within the rule (*Matter of Backer*, 2 *Abb. New Cas.*, 379).

It seems to be clear that the proof of claim made in bankruptcy in this case, by the petitioner, does not of itself prevent him from citing the assignee to account (see also *Matter of Herman*, 53 *How. Pr.*, 377); it is for the assignee in bankruptcy to set up the objection, if it is available.

VI. Is the petitioners' judgment competent, and if competent, conclusive evidence against the assignee, on this petition?

1. There is no doubt that an assignee for benefit of creditors may disaffirm or impeach, on the ground of fraud or collusion, a judgment recovered against the assignor, whether before or after the assignment. But no such ground is suggested here.

I have already shown that a verified allegation of indebtedness is sufficient to entitle the creditor to the issue of a citation; but one object of this reference is to determine whether upon the facts presented as evidence of that allegation, the petitioner is entitled to be regarded as a creditor. I have, therefore, considered the effect of the judgment fully.

I am of opinion that, in the absence of any suggestion of fraud, collusion, undue advantage or mistake, a judgment recovered against an assignor for benefit of creditors, even after the making of the assignment, on a litigation of the merits and on a deliberate and intelligent decision by a court of competent jurisdiction, is conclusive on the assignee, as to the fact and amount of an indebtedness established thereby on a consideration existing before the assignment. This I under-

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stand is in accordance with the general opinion of the profession, and the practice of the courts.

The authorities bearing on the question, although some of them do not go quite to this length, present very little conflict. They are, in detail, as follows :

A judgment obtained without fraud or collusion is conclusive evidence in suits between creditors in relation to the property of the debtor, of the indebtedness of the latter and of the amount of such indebtedness. And this is so, even though the judgment was recovered after the transfer under which the adverse parties claimed, and they were not parties to the action (*Candee v. Lord*, 2 N. Y. 269).

In this case the debtor, in August, 1843, had confessed judgment to a creditor who was one of the defendants, on which, in February, 1844, the debtor's property was sold and bought in by that defendant. In March, 1844, the complainant in the present suit recovered judgment against the debtor upon a demand which existed anterior to the judgment confessed, and then filed the present bill, to set aside the sale, on an allegation that the confession of judgment was fraudulent. The defendant sought to impeach the complainant's judgment, by showing that it was recovered in an action upon a forged indorsement, and it was insisted for the defendants that, as they were not parties, nor privies to the action against the debtor, the judgment was, at most, *prima facie* evidence against them. *Held*, that the judgment was conclusive, both as to the existence of the debt and its amount.

In *Rinchey v. Stryker*, 28 N. Y. 45, it appeared that the debtor made an assignment for benefit of creditors in November, and in December, plaintiff commenced an action against the debtor, in which he caused the assigned property to be seized on attachment, and he subsequently recovered judgment for the amount of his claim. The present action was brought

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by a purchaser under the assignment for benefit of creditors, to recover damages from the sheriff for levying on the goods by this attachment. *Held*, that the judgment recovered in the action against the debtor, although the action was commenced subsequent to the assignment, and the judgment was recovered subsequent both to the assignment and the seizure on attachment, were competent, and, *it seems* conclusive evidence of the existence of the debt, not only as against the debtor, but as against one claiming under the general assignment.

A person who is not a party or privy thereto, may collaterally impeach a judgment contravening his rights, whenever it has been obtained by fraud or collusion, or when the court rendering it had no jurisdiction, or when unlawfully entered up. Where a judgment in a personal action, whether rendered on default or after contestation, is not liable to either of these objections, it is conclusive, as to the relation of debtor and creditor between the parties, and the amount of the indebtedness, and it cannot be collaterally impeached by third parties in a subsequent suit, when such relation and indebtedness are called in question (*Sidensparker v. Sidensparker*, 52 *Me.* 481).

In that case defendant claimed land, as a grantee of the debtor, by a deed made in 1852. The plaintiff claimed under an execution issued on judgments, recovered by him in 1856 and 1860 against the debtor, on a cause of action which accrued before the deed was made. The defendant sought to impeach the judgment on the ground that the jury erred in determining the question of fact. The court held, upon the authority of *Candee v. Lord*, 2 *N. Y.* 269, and similar cases, that the question determined by the judgment could not be re-tried.

Even if the judgment be not conclusive, it is to be impeached, if at all, only by something which would

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have constituted a legal defense in the action in which the judgment was recovered (*Ferguson v. Kumler*, 11 *Minn.* 104, 110).

A judgment against the trustees in an action brought by or against them is conclusive on creditors, except as against an allegation of fraud or collusion; and the fact that such judgment was recovered by the concealment, on the part of the party recovering it, of facts which he was not required to disclose, is not fraud within the rule justifying the impeachment of the judgment.* Otherwise, if fraudulent collusion on the part of the trustees were shown (*Field v. Flanders*, 40 *Ill.* 470).

It seems that if an action is pending when an assignment is made, the judgment subsequently recovered in the action will be conclusive against the assignee and the creditors, except that it may be impeached for fraud, or by showing that a full defense was not made, and producing new proof showing that the debt was not due (*Garland v. Rives*, 4 *Rand.* 282, 316).

Upon an accounting and distribution of the funds of an assigned estate, a judgment recovered by a creditor against the assignor, establishing a debt existing previous to the assignment, is *prima facie* evidence, and *it seems* conclusive in the absence of fraud or collusion (*STRONG, J.*, *Pittsburg & Steubenville R. R. Co.'s appeal*, 3 *Grant [Penn.]* 68).

The judgment would not be conclusive against an allegation of fraud, but it is conclusive as against any defense which is purely personal to the debtor, and which he failed to set up (*Jenness v. Berry*, 17 *N. H.* 549, 556).

The judgment would not be conclusive against an allegation that the creditor wrongfully entered it by default for double the amount justly due him (*Sargent v. Salmond*, 27 *Me.* 541).

* See also *Stilwell v. Carpenter*, 2 *Abb. New Cas.* 238.

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It may also be observed that if this were a creditor's action, founded upon the judgment, and seeking to set aside the assignment on an allegation of fraud, the judgment, though recovered after the transfer, would be competent and sufficient evidence against the assignee and those claiming under the assignment, as well as against the assignor; and, although not conclusive, in the strict sense, because, to a certain extent, the assignee may inquire into the grounds of the judgment, it would be conclusive as against the objections here raised, because the assignee and those claiming under the assignment would have no right to re-try an issue which had been litigated and determined between the parties in accordance with the forms and principles of law, and without fraud or collusion (*Bump on Fraudulent Conveyances*, 559).

I conclude that this judgment against the assignor is conclusive for the purpose of this application.

2. The pendency of an appeal from the judgment does not affect its conclusive character (*Harris v. Hammond*, 18 *How. Pr.* 123; *Tyler v. Willis*, 35 *Barb.* 213; *S. C.*, 13 *Abb. Pr.* 369; *Sage v. Harpending*, 49 *Barb.* 166; *S. C.*, 34 *How. Pr.* 1).

3. The question whether the judgment, being in an action against partners, established a debt which was entitled to a dividend out of the separate estate of the assignor, has been carefully considered.

The debt by virtue of which the petitioner is entitled to a dividend is not the judgment, for that came into existence since the assignment. The judgment is relevant here only as evidence, that at the date of the assignment, the assignor was indebted to the petitioner, and therefore, that he is within the terms of the assignment, and the covenant of the assignee.

It appears by the evidence given on the trial of the action, the truth of which was reaffirmed by the assignor on his examination in this proceeding, that

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the original indebtedness was an individual note of the assignor, for which the assignor or his firm gave to the petitioner, in lieu thereof, the firm note. That the assignor paid about half of the firm note, on an arrangement with the petitioner, that he was to be released from the other half, and the question on which the litigation turned was as to the validity of this release. The court held it void, and laid down the rule, that "the substitution of one note for another extends merely the time of payment, but does not work payment; neither does it extinguish the original liability." The "case and exceptions" also indicate that the verdict was against "the defendant," and it nowhere appears that the liability of the copartner was affirmed or established in the action, nor that the judgment was such as would bind the partnership property. I therefore conclude that it is evidence of an individual indebtedness, such as would be entitled to a dividend.

VII. Is the assignee exonerated from the obligation to account, by the compromise and transfer of assets, made under the circumstances found?

[Observations disposing of a minor objection to evidence are here omitted.]

There is no question, that a settlement and division of the estate, by an assignee in trust for the benefit of creditors, made with the assent of all the parties in interest, is just as effective as if made by a formal decree of a court possessing competent jurisdiction (*Estate of Latimer*, 2 *Ashm.* [*Penn.*] 520), except that the voluntary settlement must be proved in detail, by the trustee relying on it, while the judgment is conclusive evidence of it.

If there is a complete voluntary settlement with part of the creditors and a surplus left and paid over to the assignor, the omitted creditor may maintain assumpsit against the assignee, after demand (*Fitch*

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v. Workman, 9 *Metc.* [*Mass.*] 517; *Frost v. Gage*, 1 *Allen*, 262); so, also, if the assignee has, or is accountable for, a balance justly due to the creditor, and to him alone (*Simpson v. Gowdy*, 19 *Ind.* 292).

The petitioner's claim is not impaired by the fact that there was no schedule of creditors, and no mention of the petitioner in the assignment (*Turner v. Jaycox*, 40 *N. Y.* 470); nor by the fact that there is no evidence the petitioner knew of the assignment (*Seaman v. Hasbrouck*, 35 *Barb.* 151; *Norton v. Malory*, 1 *Hun*, 499, *aff'd* in 68 *N. Y.* 494).

The inquiry whether the assignee is liable to account to an omitted creditor, notwithstanding the compromise, involves the question, is a creditor bound to take notice of the assignment, and present his claim to the assignee at the peril of being cut off, or is the assignee bound to ascertain all the debts due from the assignor, and embraced within the terms of the assignment, at the peril of liability for claims overlooked, because unknown?

The rule applicable to trusts in general, that a trustee having funds to distribute to other persons must see that the money reaches the hand entitled to receive it, and, if he makes a mistake in the person to whom he pays the money, he is still liable to pay it to the proper person (2 *Perry on Trusts*, 561, § 928), is doubtless one of the most useful responsibilities of trustees, and the existence of this responsibility lies at the foundation of the necessity and advantage of trusts; but this rule is not to be applied too stringently against assignees for benefit of creditors. Under our law, such an assignee is chargeable with the care and diligence of a provident owner, and liable for a loss by ordinary negligence (*Litchfield v. White*, 7 *N. Y.* 438, *aff'g* 3 *Sandf.* 545).

It cannot be expected from trustees that they are to act upon principles different from those which ac-

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tuates cautious and prudent men in the transaction of their own affairs (*Higgins v. Whitson*, 20 *Barb.* 141).

In respect to losses, the general rule is to require only good faith, and the same prudence and discretion that a prudent man is accustomed to exercise in the management of his own affairs. Exercise of reasonable care and prudence, and with the best judgment the trustee can form upon the question, is enough (*Davis v. Harman*, 21 *Gratt.* 200, and cases cited).

In case of an assignment in trust for a creditor, and improvements made in good faith, Chancellor KENT, on the other hand, said: "It must be, and always has been, the anxious wish of a Court of Chancery, to save a trustee from harm while acting in good faith; but a mis-application of the trust property, by going out of the trust, can never be permitted to injure the *cestui que trust*, without his assent" (*Green v. Witner*, 1 *Johns. Ch.* 26, 40).*

In *Prosser v. Masten*, not reported, but cited in 20 *N. Y.* 17 to 19, it was held by the chancellor that assignees for benefit of creditors, who re-conveyed an alleged surplus to the assignor, were liable to an omitted creditor, but not beyond the value of the assets so conveyed at the time of such conveyance, unless it were shown that they had wasted or misapplied the assets.

It does not appear whether they had notice of the plaintiff's claim.

Such a conveyance of lands was held in *Briggs v. Davis*, 20 *N. Y.* 15, to be void under 1 *R. S.* 730, section 65, as in contravention of the trust.

But the general principles applicable to trustees have not sufficed to determine in a satisfactory manner the duty and liability of assignees in respect to inquiry for claims, and payments made in ignorance of claims;

* Compare further *Franklin v. Osgood*, 14 *Johns.* 527; *aff'd* 2 *Johns. Ch.* 1; *Hext v. Porcher*, 1 *Strobb. Eq.*

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and a great diversity of opinion prevailed in cases arising prior to the statute.

The cases bearing on the point are as follows:

Where a creditor, having two demands identical in amount, one being in the preferred list, and the other in the second class, had notice of the assignment, but made no application to the assignees, and the assignees in good faith under mistaken information that there was but one debt, and that not preferred, distributed the assets to other preferred creditors,—*Held*, that the creditor was negligent, and could not hold the assignees liable (*Clark v. Craig*, 29 *Mich.* 398).

In *Ward v. Tingley*, Vice-Chancellor SANDFORD said: "If there were no directions as to the mode of ascertaining the outstanding demands against the assignor, the assignee would become informed, first, by the application of the respective creditors, and if that were not likely to inform him fully, by an advertisement in the newspapers. The latter would be discretionary; and if he should omit it, and after a reasonable time, should proceed to divide the assets in his hands among such creditors as had come to his knowledge, his duty would be discharged, and the only relief remaining for a creditor, who had been overlooked, would be to receive his demand out of any future assets that might be received by the assignee.

Any fraudulent concealment of the existence of an assignment from the creditor, or any other violation of trust in the matter, would of course entitle him to a more efficient remedy" (*Ward v. Tingley*, 4 *Sandf. Ch.* 476, 479).

In *Allmand v. Russell*, RUFFIN, Ch. J., said: "It may be taken that a trustee is bound to inquire for the debts made payable out of the fund. But it must be enough for him in the first instance, to inquire for them according to the description given in the deed. If he finds none such he may properly conclude, for any-

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thing that can be learnt from the deed, that the debt mentioned has been paid by the debtor himself or had never existed, and was mentioned by mistake." Hence where a debt was erroneously described by mentioning a surety's name, when there was no surety, and the trustee in good faith divided the fund among other creditors,—*Held*, that he was not liable, the creditor not having given him notice (*Allmand v. Russell*, 5 *Ired.* 183).

On a question of interest during delay in payment of a dividend, under the New Jersey statute, the court say that the statute does not require the assignee to give notice to the creditors, but the creditors must apply to the assignee (*Tomlinson v. Smallwood*, 15 *N. J. Eq.* 286, 288).

The assignor's books, on proof that the creditor had constant access and made entries therein, are competent in favor of the representative of the assignor, and against such creditor, as to the amount of his demand entered therein (*Griffin v. Macaulay*, 7 *Gratt.* [*Va.*] 476, 500).

Where there are no schedules of non-preferred creditors, all are entitled to come in, and "in all cases of this nature a reasonable time must be allowed for creditors to come in under any assignment" (*Story*, J., in *Halsey v. Whitney*, 4 *Mas.* 206, 225).

In an action on the assignee's bond, to distribute proceeds ratably among such creditors of the donor as had executed an agreement for a release, a plea of performance by payment to certain such creditors, and that the other creditors, if any, who signed the agreement, did not accept and prove their claims, is bad for not averring that the assignees had been ready and willing to receive the claims of others, and that notice of time and place of meeting for the purpose had been duly given (*Morrill v. Richardson*, 9 *Pick.* 84).

Assignees are held liable for payment to the wrong

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claimants, in exclusion of those entitled, although by honest misapprehension of duty, or mistaken construction of the assignment (*Ward v. Lewis*, 4 *Pick.* 518).

It is not a defense for an assignee, who had funds sufficient to pay the preferred creditors, that he has paid the funds to other creditors, by mistake, to the prejudice of a claim of which he had notice (*New England Bank v. Lewis*, 8 *Pick.* 113).

Where an assignment provides for ratable payment to such creditors as shall, within a specified time, accept its provisions, a creditor, who, from want of notice, mistake, &c., is unable to comply with the terms within the time limited, may be admitted to his share of the fund, if in a reasonable time he signifies that such is his desire, and if he has done nothing inconsistent with an acceptance of the provision made in his favor. Those who have notice and neglect or refuse, must be deemed to reject the offer (*De Caters v. De Chaumont*, 2 *Paige*, 490).

The assignee cannot claim to be exonerated, on accounting to one creditor, on the ground that he has over-paid other creditors, nor can he claim to be subrogated (*Keim's appeal*, 27 *Pa. St.* 42).

Recording an assignment in trust for the payment of creditors in another county than their residence, and where there is no real estate to be affected by it, will not be notice to any one of the assignment (*Van Nest v. Yoe*, 1 *Sandf. Ch.* 4, 15).

In *Reed v. Allerton*, 3 *Robt.* 551, it was held that the order of the supreme court discharging an assignee on petition on a compromise made, and directing him to surrender the assets to the assignor, protected the assignee in a collateral action, especially where the assets were primarily applicable to partnership debts and insufficient for that purpose, and the plaintiff was an individual creditor. BARBOUR, J., dissenting, was of opinion that the surrender and discharge

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did not exonerate the assignee as to a creditor who had a right to claim after the compounding creditors were satisfied, and who was not a party to the petition.

In this uncertainty in regard to the common law and equitable liability of the trustee, the act of 1860 and its amendments, and revision in 1877, have, I think, introduced rules which clearly define the power and correlative liability of the trustee. The statute under which the present assignment was made (*L.* 1866, c. 348, § 2) as amended by subd. 8 and 9, added by *L.* 1874, c. 600 (*Keiley*, 13), authorizes the court, in the case the debtors fail to make schedules, to compel them to make discovery;* and authorizes the assignee to take an order to advertise, requiring creditors to present their claims within a limited period, and with a provision that "the assignee or assignees of such debtor or debtors shall, by the order or decree of the said county judge, made on the final accounting of such assignee, be protected against any claim or demand not presented in compliance with such notice before such accounting shall be had." These provisions are substantially contained in the act of 1877.

Under section 4 of *L.* 1875, c. 56, as well as under the previous forms in which that section appear (*Keiley*, 16, 9, 5), the assignee practically has one year from the date of the assignment within which to proceed in the settlement of the estate and the collection of assets, &c., before he can be required to make any payment.

Under these clauses it is the duty of the assignee to take the steps prescribed by the statute,—at least that of advertising for claims,—if he desires to be protected in making payments or any other disposition of the assets among creditors before the lapse of the year.

This view is confirmed by reference to the rule ap-

* See *Matter of Strauss*, 1 *Abb. New. Cas.* 402; *Ingraham v. Cox*, 38 *Ashm.* 38.

Matter of Parker.

plicable under the similar statute as to executors and administrators.

The advertisement for claims protects the executor, if he distributes the assets in good faith after the notice has expired, among claims presented ; but if he pays before, it is at his own risk and he should suffer rather than an innocent creditor (*Clayton v. Wardell*, 2 *Bradf.* 7.)

I am therefore of opinion that the assignee's ignorance of the existence of the petitioner's claim does not, in the absence of any evidence that he advertised for claims, or has had an accounting under the statute, exonerate him from the obligation to account to the petitioner.

The questions suggested by the counsel for the assignee as to the proportion or percentage paid upon the compromise is not material to the present application, but is one to be considered upon the accounting if the court should order it.

I conclude that the petitioner is entitled to an order for an accounting, as prayed for in the petition.

No appeal was taken.

MATTER OF PARKER.

N. Y. Common Pleas ; Special Term, December, 1878.

GENERAL ASSIGNMENT FOR BENEFIT OF CREDITORS.—DISCHARGE OF
ASSIGNEE.—RE-ASSIGNMENT.

An assignee for the benefit of creditors who has accepted and entered upon his duties, but has failed to file his bond, will not be discharged on his own motion, and permitted to reassign the property to the assignor.*

* See the preceding case.

In the *MATTER OF LEAHY (N. Y. Common Pleas, Special Term,*

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He should be removed upon the application of a creditor of the assignor, and held to a strict accountability for the assigned estate.

October, 1878), it was *held* that under section 3, subdivision 5, last clause, of the general assignment act of 1877, which provided that if after the assignor's neglect to file schedules, the assignee failed to do so for thirty days, "the assignment shall be void,"—the failure rendered the assignment absolutely void as to all parties, and the remedy against the assignee was not under the statute, but by an action for an accounting.

The clause in question was inserted in the act by way of amendment ; and the attention of the court does not seem to have been called to the general provision of section 25, that after the filing or recording of an assignment, the court should have the powers of a court of equity in reference to the trust and any matters involved therein.

The clause under which the decision was made, was in 1878 repealed by an act which took effect June 21, and the court will now remove the assignee who fails to file a schedule, and will enforce the trust.

The matter of Leahy came before the court on a petition by creditors for removal of an assignee and for an accounting.

On December 11, 1877, James Leahy executed and delivered to Henry H. Stotesbury, a general assignment of all his property, which was duly recorded in the New York county clerk's office, and the assignee entered into possession of the assigned estate, but no inventory was filed.

On January 10, 1878, an agreement was entered into between Leahy, Stotesbury and the creditors at a meeting held on that day, that the said Stotesbury should purchase the assets of Leahy, and guarantee the creditors thirty per cent. of their several claims. This agreement was afterwards carried out.

Certain of the creditors, who claimed that they did not join in the above agreement, being dissatisfied with it, made this application.

Blumenstiel & Ascher, for petitioners.

James Dunne, opposed.

J. F. DALY, J.—The general assignment act of 1877 (§ 3, subd. 5), provides and declares that in case an inventory shall not be made and filed within thirty days by the debtor or the assignee, the assignment shall be void. This express enactment cannot be disregarded nor limited. An assignment declared void is as if it had never been. There are no longer assignors nor assignees.

If the person named as assignee has property which he received

Matter of Parker.

Motion by assignee for benefit of creditors to be discharged.

under the void instrument he has no title to it ; it may be seized on process against the assignor and its proceeds in the "assignee's" hands may be reached by appropriate action by any creditor. But no trust based upon the assignment as a valid instrument can be enforced, because the assignment does not exist.

Proceedings under the general assignment act of 1877 and 1878, affirm the existence of an assignment, and if there be no assignment, the proceedings cannot be maintained.

Such is the position of the parties before me. The assignment of James Leahy to Henry H. Stotesbury, was dated and made on December 11, 1877, pursuant to the statute first cited. The assignee accepted the trust pursuant to the first section of the statute. But no inventory or schedules were ever filed by the debtor or by the assignee pursuant to the third section of the act. It followed that after thirty days, or on January 11, 1878, the assignment was void. This left the title of all the property in the assignor. He sold it afterwards by a regular bill of sale to the assignee, who secured or paid to the creditors of the assignor a composition of thirty per cent. The petitioning creditors did not, as they claim, join in the agreement for thirty per cent., and now claim the right to call the assignee to account. This cannot be done under the general assignment acts, as before stated. If Stotesbury be a trustee for the creditors under the arrangement by which he took the estate, an accounting may be had by suit in equity.

It is claimed by the petitioners that the effect of the act of 1877 is to make the assignment void as to the creditors, but to leave it valid as between the parties to it. No such limitation is to be found in the statute. Where such an effect is intended, as in the statute of frauds, appropriate language is used to express the intention. In this case the enactment is general and absolute.

The statute of 1878 (General Assignment Act Amended), does not help the case, as the assignment became void before the latter statute was passed.

Petition denied with \$10 costs.

As to the power of a court of equity to compel an account, see *Jones v. Butler*, 30 *Barb.* 641; S. C., 20 *How. Pr.* 189, where it was held that a trustee cannot object to validity of the trust deed under which he acts and holds property, on the ground that the parties thereto were infants, when a court of equity is asked to compel him to render an account. Whether the contract between the parties is to be

Matter of Parker.

John L. Parker, on November 1, 1878, executed to Henry A. Marriotte a general assignment for the benefit of his creditors, which was on that day duly filed in the county clerk's office. The assignee having been unable to furnish sureties, made this application on an order to the assignor to show cause why he should not be discharged, and re-assign the property. Other facts sufficiently appear in the opinion.

Miron Winslow, for assignee and motion.

VAN HOESSEN, J.—[After stating the facts.]—It was the duty of Parker to make an inventory of his estate within twenty days thereafter, but if he failed to do so, the duty of making such inventory was then devolved by law upon Marriotte. Marriotte could have applied to this court for an order compelling Parker to appear, and disclose under oath all he knew concerning the assigned estate. Instead of doing his duty, Marriotte says that he thought he would wait until Parker furnished sureties for his (Marriotte's) bond as assignee, but as Parker fails to produce sureties for him, he asks to be discharged, and for leave of the court to reassign the assigned estate to Parker. Marriotte evidently views the assignment as a matter in which only Parker and himself have an interest, and he does not see why Parker's creditors should be consulted, or be paid.

Instead of granting Marriotte's application for a discharge, and for leave to reassign the property to Parker, the proper course is to remove him, and to hold him to a strict accountability for the assigned estate.

upheld or not, he cannot dispute the authority under which he holds the trust funds, and seek in such a way to retain the trust property to his own use.

So it has been held that a trustee cannot set up the want of registration which, under the statute, makes his deed void, in opposition thereto (*Cooper v. Day*, 1 *Rich. Eq.* 26, 39.)

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Any creditor of Parker may now apply to the court for Marriotte's removal, for an accounting, and for the examination of Parker and his books.

The application of Marriotte is denied.

HAVEMEYER v. LOEB.

*U. S. District Court, Southern District of New York;
December, 1877. Again, June, 1878.*

ALLOWANCES TO ASSIGNEE FOR BENEFIT OF CREDITORS, FOR
EXPENSES AND COUNSEL FEES, WHEN ASSIGNMENT
HAS BEEN SET ASIDE, AS IN FRAUD OF
THE BANKRUPT ACT.

The principles governing allowances for services of counsel to State assignees, laid down in *Platt v. Archer* (18 *Blatchf.* 351), approved.

Where a voluntary assignment is set aside, because made in violation of the bankruptcy statute, the expense incurred in caring for the property prior to the bringing of the suit, which was proper and reasonable in amount, should be allowed.

The expense was incurred for the property within this rule; if the services were properly or necessarily rendered to the State assignee and those services were properly rendered, so far as they benefited and preserved the property assigned, and were not hostile to the suit in bankruptcy.

Where the voluntary assignee acts in good faith in accepting the assignment, his disbursements for services of counsel, made in good faith, which are necessarily and properly incurred down to the time that he received notice of an intention to attack the assignment as in violation of the bankrupt law, are to be allowed.

Exceptions to a master's report granting allowances for counsel fee.

This action was brought by James Havemeyer, assignee of Daniel Frey, Isidor Frey and Jacob L. Haas, bankrupts, against Charles Loeb, their assignee

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for the benefit of creditors under the general assignment law of the State of New York.

The said Daniel Frey, Isidor Frey and Jacob L. Haas made a general assignment for the benefit of creditors to the defendant on April 28, 1876. On August 1, 1876, they were adjudicated bankrupts, and the plaintiff qualified as assignee in bankruptcy on February 19, 1877, and began this action on April 2, 1877.

I. December, 1877.

An interlocutory decree was made by the district judge on June 2, 1877, declaring that the said general assignment was adjudged void and of no legal force as against the plaintiff as such assignee, because made in fraud and violation of the provisions of the bankruptcy statute of the United States ; and referred to a special master to report to the court an account of the payments, expenses and charges of the defendant as such assignee, including his own fees for his services.

The said special master reported, among other things, that the defendant produced an account from May 3 to December 20, 1876, showing receipts \$3,073.32, and disbursements \$2,154.92, leaving a balance on hand of \$918.40 ; that two of the disbursements were for counsel fees, each of \$500, which were paid, one on July 18, and the other on August 1, 1876, for services, without specification ; that as the payment of this \$1,000 for counsel fee was made subsequent to the filing of the petition in bankruptcy, and the net balance in the hands of the defendant was only \$918.40, and the assignment to him was void, it should not be allowed ; that the defendant's attorney conducted no suits and defended none but this one ; that the sum of \$244.70, paid by the defendant to one Haas, should be disallowed ; and that the defendant should be charged with interest at 6 per cent. per annum on the two sums

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of \$500 each, and on the \$244.70, from the times respectively when they were paid.

The defendant excepted to this report, 1. For disallowing \$1,000 for counsel fee, and claimed that he should have found that the plaintiff in this action qualified as assignee in bankruptcy on February 19, 1877; that no steps or proceedings were taken by any creditor or other person until the service of the subpoena in this action on April 2, 1877, notifying the defendant that any proceedings had been begun or that any demand would be made upon him for the return to any person of the assets of the estate originally assigned to him; that the defendant from April 28, 1876, to the commencement of this action, acted in good faith in the administration of the trust under the assignment, and had accounted for all the property assigned to him; that in the execution of said trust he was obliged to employ counsel, and that the counsel fee of \$1,000 paid was reasonable and fair; that a large part of said business was rendered necessary by the laches and neglect of the creditors of said assignors, and who remained idle and did not proceed to adjudicate said assignors bankrupts, nor to elect an assignee in bankruptcy until many months after the defendant had realized upon the assignors' estate.

2. For charging interest on the counsel fee and the \$244.70, and claimed that he should have found that the said sums were paid out by the defendant in the exercise of his judgment prudently exercised, and that he did not have or enjoy the use thereof.

3. For neglecting and failing to rule upon or dispose of a large number of objections raised during the pendency of the examination before him, so that defendant could not ascertain from the report what amount of testimony so objected to the master relied upon in forming his judgment, and what he excluded.

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In passing upon the foregoing exceptions the following opinion was rendered :

William A. Abbott and T. H. Barowsky (Abbott Brothers, attorneys), for plaintiff.

Melville H. Regensberger, for defendant.

BLATCHFORD, J.—The principles which must govern the allowances for the services of counsel to the defendant in this case, as assignee under the voluntary assignment, are those which are laid down in *Platt v. Archer* (13 *Blatchf.* 351).

I do not think that as to the particulars covered by the exceptions to the master's report herein, in respect to counsel fees, the master has observed, in his report, such principles. The interlocutory decree does not, as stated in the report, adjudge the assignment in this case to be fraudulent and void.

It adjudges it to be "void and of no legal force and effect, as against the plaintiff as such assignee, because made in fraud and violations of the provisions of the bankruptcy statutes of the United States, hereinafter referred to in the particulars set forth in the bill herein."

No fraud, in fact, was established, and the only fraud found was a constructive fraud, consisting in doing what, under the bankrupt statute, the assignee has a right to avoid. Nor does the fact that the \$1,000 was paid after the petition in bankruptcy was filed, operate of itself to make such \$1,000 not allowable, as seems to be supposed by the master. I do not intend to imply that the \$1,000 or any part of it ought to be allowed. But if it was an expense incurred for and on account of the property, prior to the bringing of this suit, and was reasonable in amount, and necessary or proper, it ought to be allowed, or so much of it ought to be allowed as comes within the above description.

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It was incurred for and on account of the property, if the services it applied to were properly or necessarily rendered to the defendant, and those services were properly rendered, so far as they benefited and preserved the property assigned and were not hostile to the suit. The master seems to have proceeded on a different principle. The disallowance of the two items amounting to \$1,000 is excepted to.

A reconsideration of the case by the master, on the principles herein laid down, may result in the same conclusion, but, if so, the determination will have been arrived at on the proper principles.

The second exception must also be allowed, and the question of interest must be reported on anew. I do not now approve or disapprove the charge of interest as to any one of the three items on which the master charged it. It will come up on the new report.

As to the third exception, the proper course is to call on the master to make rulings on the point referred to, and embody them in the testimony.

The matters covered by the three exceptions must be referred back to the master for a report in conformity with the views contained in this opinion, which report will also embody all the matters referred by the interlocutory decree.

II. *June, 1878.*

The matter having been before the special master a second time, according to the foregoing direction of the court, he made another report, dated March 12, 1878, in which he found in respect to defendant's exceptions in brief as follows: That Daniel Frey and others were adjudicated bankrupts on August 1, 1876, and that the plaintiff qualified as assignee on February 19, 1877, and the action against the defendant was commenced April 2, 1877; that no steps were taken by any one until then by which the defendant was notified

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that he would be required to return the assets to any one; that the defendant from April 28, 1876, to the commencement of the action, acted in good faith in the administration of the trust, and had rendered an account of all the property that was assigned to him; that he was obliged, in the execution of the trust, to employ counsel, and that the payments therefor were reasonable and fair to the extent set forth as follows:

1. Services in drawing schedule, . . \$100
2. Preparing accounting, . . . 75
3. Preparing and filing bond, . . . 20
4. Services respecting pledges, . . . 130
5. Services canceling bond, . . . 75
6. Services fifty interviews, . . . 100
7. Accounting in equity action, . . 200

that two other items, amounting to \$300, should be disallowed, because not beneficial to the estate; that the payment of \$244.70 to Haas should not be allowed, and defendant should be charged interest thereon from July 12, 1877, when he made payment of a balance of \$918.40 to the plaintiff; that after the petition in bankruptcy was filed the creditors delayed the election of an assignee for eight months, and for seven months after the defendant had realized upon the assignors' estate, and that a part of said services were rendered during that period, but what proportion thereof particularly the evidence did not enable him to find; that the interest mentioned in the former report should not be paid except as above stated; and that the objections raised on the hearing had been examined and disposed of.

To this report both parties excepted.

Abbott Brothers and T. H. Barowsky, for plaintiff.

Melville H. Regensburger, for defendant:—I. The laws of the State of New York regulate the payment of

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fees to the assignor, whenever the assignment itself does not contain a clause in that respect: when it does, the acceptance of the trust binds the trust estate in respect to every reasonable provision therein made for the compensation of the assignee and his counsel.

II. An assignment for the benefit of creditors, made in good faith, without preferences and in accordance with the law of the State where the assignors reside, is not fraudulent and void *per se* (Mayer v. Hellman, 1 *Otto*, 496; Haas v. O'Brien, 66 *N. Y.* 597; *S. C.*, 1 *Abb. New Cas.* 173; Sedgwick v. Place, 1 *Nat. Bankruptcy Reg.* 204, 673; Langley v. Perry, 2 *Id.* 180). Therefore the defendant was justified in proceeding with the due execution of his trust and incurring the reasonable charges of his counsel.

III. None of the services for which compensation is asked in this proceeding were hostile to this suit in bankruptcy in this court (Platt v. Archer, 13 *Blatchf.* 351; *In re* Stubbs, 4 *Nat. Bankruptcy Reg.* 376; *In re* Burkholder v. Stump, *Id.* 597; *In re* Street v. Dawson, *Id.* 207; MacDonald v. Moore, 1 *Abb. New Cas.* 58). Those services benefit and preserve the property, which make it impossible for the estate to diminish, and which result in having the fund in a shape for immediate use.

IV. The plaintiff is guilty of inexcusable neglect and gross laches in permitting the defendant to proceed with his trust after the commencement of the proceedings in bankruptcy.

V. The disbursements and allowances to the State assignee are recognized by the bankrupt court (MacDonald v. Moore, *supra*). The practice in the State courts is similar (Bostwick v. Beizer, 10 *Abb. Pr.* 197; Grover v. Wakeman, 11 *Wend.* 187, 192; Colburn v. Morton, 1 *Abb. Ct. of App. Dec.* 378, and cases cited). The \$300 rejected by the master should be allowed.

CHOATE, J.—Exceptions to master's report, allow-

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ing the defendant, who held the property of the bankrupt under a voluntary assignment for the benefit of creditors, certain disbursements for services of counsel. The case has been before the court once already on exceptions to a former report, and the principles governing these allowances were clearly stated by Judge BLATCHFORD. The defendant acted in good faith in accepting the assignment, and his disbursements for services of counsel, made in good faith, and which are found to have been necessarily incurred down to the time that he received notice of an intention to attack the assignment as in violation of the bankrupt law, are to be allowed.

I see no reason to dissent from the conclusions of the master as to the amounts allowed for the services rendered. The question is, therefore, whether the several items are proper charges. The items for \$100 for perfecting the debtors' schedule; \$75 for services in preparing for an accounting before the State court; \$20 for preparing and filing the bond required of the assignee; \$75 for getting the bond canceled; \$130 for services respecting pledges; and \$100 for interviews on the business of the trust seem to be proper within the rule. Counsel for plaintiffs insists that it must appear that the services rendered actually benefited the fund, and he relies on some expressions in the opinion of the learned judge in this case for excluding these items on the ground that they are not shown to have benefited the fund. But I understand the opinion to mean that while the assignee is acting in good faith and without notice of any intention on the part of creditors or a bankrupt assignee to attack the assignment, all disbursements of this character which are rendered necessary and proper by the duty and trust which the assignee has assumed towards the estate are to be deemed beneficial to the fund (see *McDonald v. Moore*, 15 *Nat. Bankruptcy Reg.* 26).

Matter of Youngs.

The item of \$200 for services rendered by counsel in the accounting in this case, being services rendered in defense of this suit brought to set aside the voluntary assignment, therefore hostile to this suit, cannot be allowed.

Defendant's exceptions overruled.

Plaintiffs' exceptions sustained as to item of \$200.

Decree in accordance with this opinion.

MATTER OF YOUNGS.

N. Y. Common Pleas ; Special Term, November, 1879.

ASSIGNEE FOR BENEFIT OF CREDITORS.—COMPROMISE OF CLAIM DUE ESTATE.—NOTICE TO CREDITORS.—REFERENCE.

On an application by an assignee for leave to compromise a claim due the estate, the court may, in its discretion, require notice to be given to the creditors so that they may be heard.*

The application may be referred to a referee, with directions to give by mail (or personally, where practicable), eight days' notice to the persons indicated by the schedules as creditors.†

Application by the assignee of Youngs, Smith & Co., for leave to compromise a claim due the assigned estate.

Miller & Peckham, for assignee.

J. F. DALY, J., in directing notice to be given to the creditors, *held* as above.

* NOTE ON TRUSTEES' COMPROMISES.

The following summary of the authorities on the power of courts of equity to advise and direct assignees and other trustees to com-

† See on this point, *Loring v. Steineman*, 1 *Metc.* 207; *Kerr v. Blodgett*, 48 *N. Y.* 62; 16 *Abb. Pr.* 137; *Matter of Empire City Bank*, 18 *N. Y.* 199; *S. C.*, 8 *Abb. Pr.* 192; *Metrop. Board of Health v. Heister*, 37 *N. Y.* 661.

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promise, taken in part from an opinion rendered by AUSTIN ABBOTT, as referee in a case arising under the general assignment act, may be useful in this connection.

I. *The general function of the court as the counsel of trustees.*

In Shipman's Petition (1 Abb. New Cas. 406), it was held in this court (ROBINSON, J.), that the county judge's power under the act of 1860, then in force, did not extend to directing the assignee in the general administration of the estate; but the assignee must apply to a court of equity, if he desired sanction in a compromise or conversion of assets.

Subsequently the statute was amended in the revision so as to confer this power.

The provision of the General Assignment Act of 1877, conferring this equitable power upon the court, is as follows: "Sect. 25. Any proceeding under this act shall be deemed for all purposes, including review by appeal or otherwise, to be a proceeding had in the court as a court of general jurisdiction, and the court shall have full jurisdiction to do all and every act relating to the assigned estate, the assignees, assignors and creditors, and jurisdiction shall be presumed in support of the orders and decrees therein unless the contrary be shown; and after the filing or recording of an assignment under this act, the court may exercise the powers of a court of equity in reference to the trust and any matters involved therein."

This includes the power to advise the assignee. In the case of Treadwell v. Cordis, 5 Gray, 341 (Mass. Supreme Ct. 1855, Opinion by SHAW, Ch. J.), it was held that equity jurisdiction, given by statute in cases of trust arising in the settlement of estates, is broad enough to extend to cases where trustees seek the aid and direction of a court of equity, where there is doubt and difficulty, and where there are conflicting claims on the part of different parties to the same property or rights, under the instrument by which such trust is created.

The most familiar case of the exercise of this power in our courts is that of an action by an executor for the construction of a will; but such cases are only one instance, and they rest upon the well-settled principle of equity, that any trustee placed in circumstances in which he may have reasonable doubt as to the disposition of the fund in his hand, has a right, for his own safety, to apply to a court of equity for direction, making the persons interested parties to the proceeding. Goodhue v. Clark, 37 N. H. 525.

To the same effect is Hayden v. Marmaduke, 19 Mo. (4 Benn.) 403.

In Jones v. Stockett, 2 Bland (Md.) 409, 425 (1830), the subject was fully discussed by Chancellor BLAND. His statement of the rule

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is as follows: "It has been long, and well-settled, that in all cases where property has been vested in a trustee; or placed in his hands, or put under his control for the purpose of securing it for the benefit of any one; or to insure its proper application in any legal way as prescribed by the owner, that although such trustee may, in almost all cases, if he thinks proper, take upon himself the risk of properly executing the trust without assistance from any quarter; yet he is not absolutely bound to do so. He may in all cases where the nature of the trust is governed by principles of equity, as most commonly happens, ask the direction of a Court of Chancery; and act under the indemnity of its decree; not because such a court is, in itself, considered as a proper or suitable agent for the mere safe-keeping, or management of any property; but because where property has been put into a particular course, allowed and regulated only by principles of equity, it is fit and proper, that all who have a beneficial vested interest in it; as well as the agent to whose management it has been confided, should have an opportunity of coming before a tribunal whose peculiar province it is to apply such principles; and have such property so regulated; as well that those who may be then, or thereafter beneficially interested, may sustain no loss, as that the trustee may fall into no mistakes, nor be subjected to any unreasonable responsibility in cases, where the rules of equity, by which his administration must be governed, are complex and of difficult application. And therefore it is, that in all such cases, where a trustee comes before a court of equity, as a plaintiff, or is brought before it as a defendant, and declines to execute the trust without the direction and indemnity of the court, he is held to be so entirely justifiable in thus seeking its protection, that he is never charged with interest or costs; and that all such losses and expenses are directed to be borne by the particular trust fund in regard to which the direction has been required."

The exercise of the power is not confined to the determination of the construction of the trust instrument, nor to purely equitable questions.

Thus, in *Talbot v. Earl of Radnor*, 3 M. & K. 252 (before the Master of the Rolls, SIR JOHN LEACH, 1834), it was held proper for trustees to file a bill to determine, among other things, a purely legal question raised by the adverse claim of a third person to property claimed by the trustee as a part of the fund; but that as the claim was a pure question of law in ejectment, the adverse claimant had a right to elect to prosecute his action at law.

So in *Wheeler v. Perry*, 18 N. H. 307 (1846, Opinion by PARKER, Ch. J.), it was held that a trustee, who had paid over extraordinary dividends to a beneficiary, in ignorance of a doubt as to whether the

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dividends did not belong to the body of the fund, and who held other like dividends, might properly apply for aid and direction upon the conflicting claims, both as to the money he had already paid over, and re-claimed by him, and as to that still in his hands and claimed by the beneficiary.

The question turned, not on the construction of the trust, but on the true character of extraordinary dividends.

But in *Greene v. Mumford*, 4 R. I. 313, 322 (1856, Opinion by *AMES*, Ch. J.), the court refused to act on the bill of a trustee which was evidently framed by consent, and involved no question of doubt either on the construction of the instrument or on equitable considerations, but only the legality of a tax as to which he had an easy and safe remedy by an action at law.

At common law and in equity, independent of statute, and without previous sanction of the court, a trustee has power to compromise, at the peril of assuming the burden of proof, if his act be afterward called in question, that the compromise was fair, in good faith, and that it was justified in the interest of the estate, by the situation at the time when it was made.

Thus, in *People v. Pleas*, 2 Johns. Cas. 376, the power of an administrator to compromise a suit against the estate was established (1801, Opinion by *KENT*, J.). Among the assets that came to the administrator's hands was a lease for lives; and an action was brought against the widow who was tenant in possession to recover the estate; and the administrator, the widow and the adult parties in interest, believing that the lease had been forfeited, agreed to a compromise with the claimant of the fee, who paid them \$750. *Held*, valid. But it appearing that the administrator subsequently discovered that the estate was not forfeited, he was not justified, five years afterward, in giving a release.

In *Murray v. Blatchford*, 1 Wend. 583, 616 (Court of Errors, 1828, Opinion by *SAYAGE*, Ch. J.), it appeared that pending a suit for settlement of partnership accounts, the complainant died; his three administrators prosecuted the suit and obtained a report for \$90,000; defendant having become insolvent, two of the administrators compromised with him for \$30,000 and released him. This was done by the counsel of Chancellor *KENT*, and with the assent of parties in interest representing two-thirds of the subject in controversy; the other parties in interest thereupon filed a bill to set aside the compromise as fraudulent. The circuit judge confirmed the compromise as to those who had assented, and declared it inoperative as to those who objected. The court of errors reversed the decree, holding that the evidence did not sustain the charge of fraud; that two administrators had power to

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compromise against the will of the other. The opinion of the court lays stress upon the circumstance that the debtor compromising did not intend to submit to the judgment, but would appeal; and adds: "suppose the administrators had no interest in the avails, and those owning two-thirds of the fund had urged such an arrangement, but it was declined, and in the end much less had been recovered; or suppose the whole had been lost, through the subsequent failure of Murray, after rejecting such an offer; would not those who had urged the settlement have much more reason to call upon the administrators and charge them with a violation of duty?"

In *Leland v. Manning*, 4 *Hun*, 7 (1875, Opinion by BRADY, J., DAVIS, P. J., and DANIELS, J., concurring), it was held that upon general principles, an executor not only has the power, but is bound, to compound and release a debt, if the interest of the estate requires it. He is obliged to act as a discreet and prudent man would act were the debt his own.

In *Gilman v. Gilman*, 6 *Sup'm Ct. (T. & C.)* 211 (1875, Opinion by DANIELS, J.) the general term held that the majority of executors had power to compromise a claim against the estate, and to allow a part of it, although it was not recognized by the testator. That if such a settlement were collusive or fraudulent it might be impeached alike at common law and under the statute; but no want of good faith appearing, the settlement could not be opened merely because they might have erred in allowing more than the claimant was entitled to.

In *Berrien's Estate*, 16 *Abb. Pr. N. S.* 23, it was held that executors and administrators may be authorized by the surrogate under the statute (2 *R. S.* 87, vol. 3, 6th Ed. p. 95, § 35), to compromise a claim of the estate against a solvent debtor, the amount of the claim being in dispute on admitted grounds, and the difficulty of successfully resisting a recoupment or counter-claim being admitted. Overruling *Howell v. Blodgett*, 1 *Redf. N. Y. Surr.* 323.

In *Bacot v. Heyward*, 5 *Rich. (S. C.)* 441, a compromise of litigation, made by the trustee on his own responsibility, was approved by the court. A trustee under a marriage settlement sued on bonds which he held for the price of slaves (this was in 1870); and he recovered judgment, subject, however, to the final decision of the court of last resort of the question then pending as to the validity of such bonds. Before that court decided such bonds to be valid, as it afterward did, a compromise was agreed on between the trustee and the debtor, by which the debtor paid about half the amount of the judgment, and was released from the balance. *Held*, a proper compromise.

In *Reynolds v. Brandon*, 8 *Heisk. (Tenn.)* 593, it was held that the

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power of the court to advise a trustee might be exercised for the purpose of sanctioning a compromise.

In *Crosby v. Mason*, 32 *Conn.* 482; S. C., 6 *Am. Law Reg. N. S.* 18 (1865) the court say, on a bill by executors for the construction of a will, that although such suits are not favored (a disfavor which, so far as I know, has only been expressed in the courts of New England where equity jurisdiction is sparingly entertained in all cases), they are entertained to save litigation; and the court say: "It would be difficult to obtain competent and suitable persons to accept situations of great perplexity and responsibility, unless they were permitted to obtain the advice of a court of chancery as to the proper discharge of their duties. The court is not bound to entertain such an application, as its interference in such cases is always a matter of discretion. It is clearly for the advantage of all parties in interest to have questions of law, interrupting and delaying the settlement of estates, disposed of in this way, and they have a full opportunity to be heard."

Assignees for benefit of creditors are trustees within the rule.

Thus in *Coe v. Beckwith*, 10 *Abb. Pr.* 296; S. C., 81 *Barb.* 389 (Sp. T. 1860, Opinion by LEONARD, J.), it was held that a trustee for the benefit of creditors, in this case a trustee under a railroad mortgage deed, may maintain an action for direction as to the right to the funds held by him, and claimed by various persons, and among others attaching creditors; and that unknown creditors or parties in interest, if numerous, need not be joined as parties.

In *Dimmock v. Bixby*, 20 *Pick.* 368, it was held that assignees for benefit of creditors are entitled, upon the same principle as executors or trustees in general, to the protection of a court of equity in the execution of their trusts, and that this familiar principle ought to be liberally applied in all cases where the security of trustees, acting fairly, may require the application. Whenever a trustee doubts as to his safety and security in complying with any claim of a *cestui que trust*, or doubts as to any other matter arising in the execution of his trust, his only prudent and safe course is, to wait for the directions of a court of equity. The common course in such cases is, for the trustee to decline acting without such a sanction, leaving the *cestui que trust* to bring his bill to compel the execution of the trust, but it does not seem to be material whether the trustee be a plaintiff or a defendant in the suit, the object of the application to the court being in either case the same.

The question in this case was as to the duty of assignees for benefit of creditors in settling conflicting claims, and in construing the deed, and in applying the funds. The court held (p. 376) that the assignees were not obliged to wait until they should be sued by the

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creditor; and the law regards it as the duty of a trustee in a doubtful case to seek such advice. The bill, however, in this case, was held multifarious for joining other matters.

In *Freeman v. Cook*, 6 *Ired. Eq. (N. C.)* 373, 378 (1849), NASH, J., in speaking of trustees who had acted merely under advice of counsel, and whom he held not protected, said that their only safe course was "to have procured the advice of a Court of Chancery, which they had a right to resort to. . . . The chancellor is the only safe and secure counsellor to trustees."

In a note to the case of *Crosby v. Mason*, in 6 *Am. L. Reg. N. S.* 18, 19, Judge REDFIELD, the learned author of the treatise on wills and executors, in speaking of the right of the personal representative to demand the aid and direction of a court of equity in regard to the mode of performing his duties, says: "This is a matter of great concern to the representative, and to the extent of his personal responsibility. For if he assumes to act upon his own judgment and discretion in a matter of *bona fide* doubt, and where he might ask the direction of the court in such a form as to settle the rights of all parties and relieve all doubt and uncertainty, he must be regarded as acting voluntarily upon his own responsibility in a matter where there was no actual necessity of his assuming any such responsibility; and if it should ultimately appear that he was mistaken in regard to the law, it will afford no justification or excuse that he acted according to his best judgment and discretion and in the most undoubted good faith in a matter where he might have certainty to guide him in the performance of his duty. No trustee has any right to act upon uncertainties or probabilities, merely."

On such an application the court will not order the trustees to act; but will only sanction and authorize what is proposed to be done, if proper. *Wiswell v. First Congregational Church*, 14 *Ohio St.* 31, 43 (1862, Opinion by RANNEY, J.).

So too the creditors themselves may apply. If, from any cause, the execution of the trust for creditors, under a general assignment, has become so embarrassed that the aid of equity is required for the direction of the trustee, certainly, where he admits that he contemplated asking the direction of the court, the creditors need not wait for him, but may themselves file a bill. *Wilson v. Brown*, 13 *N. J. Eq.* (1 *Beas.*) 246.

II. *The form of the application.*

Some difference of opinion has existed as to whether the application may be by petition or must be by action.

The generally recognized principle in courts of equity is that laid down by KENT, Ch. J., in *Codwise v. Gelston*, 10 *Johns.* 521, that on

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a collateral matter which has reference to suit in court, the court may act on petition.

So in the Matter of Foster, 7 Hun, 180, it was held that the proceeding to discharge a trustee may be by petition, and will be conclusive on the parties to it; and that the equity powers of the court are broad enough to entertain a petition from the *cestui que trust* to open the discharge, without putting him to an action.

In Neale v. Davies, 5 De G. M. & G. 258, it was held that the defendant's answer setting up the doubt is an application for advice on which the court can act.

In Exp. Calmes, 1 Hill (S. C.) Eq. 112, it was held that a testamentary trustee may file a petition to obtain the sanction of the court to an investment, there being no directions in the will; and that a dismissal of the petition was error.

In the case of the Petition of the Baptist Church, 51 N. H. 424 (1871, Opinion by BELLOW, Ch. J.), it was held that by virtue of the general jurisdiction of a court of equity over trusts, a trustee in case of doubt may seek the aid and direction of the court; and that when a petition is filed instead of a bill, it is amendable if a bill be necessary.

See also Matter of Le Blanc, 4 Abb. N. C. 221.

III. *The effect of proceeding without notice to the creditors.*

In Lorillard v. Coster, 5 Paige, 172, 215, it was held on a bill by executors and trustees to settle the construction of a will and carry it into effect, that if neither party to such an action raises the objection that *cestuis que trustent* not joined are necessary parties, it is competent for the court to go on and make the proper decree so as to settle the rights of parties then before it; which decree, of course, is without prejudice to the rights of those who are not before it.

In Kearney v. Macomb, 16 N. J. Eq. (1 O. E. Green), 189 (1863, GREEN, Chan.), on a bill by trustees under a marriage settlement for instructions, the court held that as the decision was solely for the guidance and protection of the trustees, and it would conclude the rights of those only who were parties, the court would determine the questions, although they might affect some who were not before the court.

In Sollee v. Croft, 7 Rich. Eq. (S. C.) 34, 43, 45 (1854, Opinion by WARDLAW, Chan.), it was held that orders sanctioning a trustee's sale of the property, made on his petition, do not bar a *cestui que trust* who had no notice; but on a bill by the latter to hold him to account, the court should approve the transaction if the facts, shown to have existed when it was made, were such that it should have been sanctioned then, had application been made.

Matter of Thomas.

In *Anonymous v. Gelpcke*, 5 *Hun.* 245 (1875, Opinion by DANIEL, J., DAVIS, P. J., and BRADY, J., concurring), a trustee, under an assignment made for the benefit of creditors, without notice to the creditors or to his co-trustee, who he knew was opposed to the compromise of a claim, applied to the court, by a petition purporting to be made on behalf of himself and his co-trustee, for instruction to make such compromise, and obtained an order directing it. *Held*, on application for the passing of his accounts, that such order was no protection for the compromise made thereunder by such trustee. That when controverted rights or doubtful acts are to be determined, notice should always be given to the parties interested.

An order of the court of chancery, authorizing a trustee to mortgage, is inoperative against *cestuis que trustent* then living, who were not made parties to the proceedings in which such order was made; and the mortgage is void as against them. *N. Y. Superior Court*, 1860, *Horspool v. Davis*, 6 *Bore.* 581.

IV. *As to the extent to which the court may control the discretion of a trustee*, compare *Gisborne v. Gisborne*, *L. R.* 2 *App. Cas.* 308; 86 *L. T. N. S.* 564; *Re Roper's Trust*, 40 *L. T. N. S.* 97; *Pink v. De Thuissey*, 2 *Mad.* 157; *Costabadie v. Costabadie*, 6 *Hare*, 410; *Levesey v. Harding*, *Tamlyn*, 460; *Collins v. Vining*, 1 *C. P. Cooper's Cas.* 472; *Re Hodges*, *L. R.* 7 *Chan. Div.* 754; *Brophy v. Bellamy*, 29 *L. T. N. S.* 880; *Walker v. Walker*, 5 *Mad.* 424; *Thomas v. Dering*, 1 *Keen*, 729; *Cafe v. Bent*, 3 *Hare*, 245; *Sillibourne v. Newport*, 1 *Exy & J.* 602; *Kekewich v. Marker*, 3 *Macn. & G.* 326; *Talbot v. Marshfield*, *L. R.* 3 *Ch. App.* 622.

MATTER OF THOMAS.

N. Y. Common Pleas; Special Term, January, 1879.

ALLOWANCES TO COUNSEL OF ASSIGNEE FOR THE BENEFIT OF CREDITORS.

Allowances cannot be granted, to the counsel of the assignee for the benefit of creditors, out of the assigned estate, before the final accounting.*

An assignee making any payments to counsel must do so upon his own responsibility.

* See the following case; and *Havemeyer v. Loeb*, in this vol.

Matter of Weinhaus.

Motion for allowances to counsel of John L. Hill, assignee of Thomas & Co., before the final accounting.

Ely & Smith, for assignee.

J. F. DALY, J.—Since this matter was referred, this court at special term has decided that there is no power to grant any allowance out of the fund to counsel for an assignee before his final accounting (LARREMORE, J. Matter of Youngs, Smith & Co.).*

This decision is controlling, because the principle upon which the payments here asked for are urged, is substantially that there was employment of counsel by authority of the assignee (or by agreement of the assignment within the scope of his powers).

I shall have to order that this application stand over until the final accounting.

Of course the assignee may make any payments he thinks proper, taking the responsibility for his action.

MATTER OF WEINHAUS.

N. Y. Common Pleas; Special Term, December, 1878.

GENERAL ASSIGNMENT FOR THE BENEFIT OF CREDITORS.—ACCOUNTING BY ASSIGNEE.—CONFIRMATION OF REPORT OF REFEREE.—ATTORNEYS.—EXTRA ALLOWANCE.

The report of a referee appointed on a final accounting of an assignee for the benefit of creditors, may be confirmed on consent of the creditors.

* In the MATTER OF YOUNGS, &c. (*N. Y. Common Pleas; Special Term, November, 1878*), LARREMORE, J., *held* that the court cannot grant an allowance or counsel fee to counsel for an assignee, except on an accounting. The assignee may, before accounting, make payments to counsel such as he deems necessary, subject to his obligation to show their necessity and reasonableness when he asks to be allowed for them on his accounting, as disbursements.

Hall v. Waterbury.

No extra allowance will be granted to the counsel or attorneys of the assignee, on such a proceeding.*

Motion for confirmation of report of referee.

This was a motion by Richard Field, assignee for the benefit of creditors of Charles H. Weinhaus, for the confirmation of the report of a referee, duly appointed, on his final accounting, and also for an extra allowance to the counsel and attorneys for the assignee.

The creditors consented to the allowance of the account.

Kling & Huerstel, for assignee.

VAN HOESEN, J.—For the reason that the creditors consent to the allowance of this account, it will be passed, and the assignee be discharged. There can be no allowance to counsel or attorneys in a proceeding like this.

HALL v. WATERBURY.

N. Y. Common Pleas ; Special Term, January, 1879.

ASSIGNEE IN BANKRUPTCY.—SECURITY FOR COSTS.

An assignee in bankruptcy is not the trustee of the estate of any debtor within the meaning of the Revised Statutes.

He is not personally liable for costs except when guilty of misconduct or bad faith.

The non-residence of an assignee in bankruptcy is no reason for requiring security for costs.

Motion by defendant for security for costs.

This was an action by E. Stanley Hall, as assignee in bankruptcy of H. L. Hewlett, against Joseph Phillips and Stephen W. Waterbury, *et al.*, to recover the value of a quantity of merchant tailoring goods taken by Joseph Phillips, a city marshal, from Henry L. Hewlett, under two certain warrants of attachment

* See the preceding case.

Matter of Fitzgerald.

issued out of the marine court, at the instance of defendants, Waterbury, Smith & Co.

This motion was made for plaintiff to file security for costs, because he had removed from the State after the commencement of the action.

Edward Jacobs (Jacobs Brothers, attorneys), for defendant and motion.

C. J. G. Hall, for plaintiff, opposed.

VAN HOESEN, J.—Motion for security for costs denied. The assignee in bankruptcy is not the trustee of the estate of any debtor within the meaning of the Revised Statutes (*Ferriss v. Am. Ins. Co.*, 22 *Wend.* 586). Nor is he under section 317 of Code of Procedure personally liable for costs, except where guilty of misconduct or bad faith (*Reade v. Waterhouse*, 52 *N. Y.* 587).

His non-residence is, therefore, not any reason for requiring security for costs.

MATTER OF FITZGERALD.

N. Y. Common Pleas; Special Term, December, 1878.

ARREST.—BANKRUPTCY.—FOURTEEN-DAY ACT.—CONFLICT OF LAWS.

If it should appear that all the property which one arrested under an execution for debt had when arrested, had been taken away from him without his fault and against his will, his discharge, under 3 *R. S.* p. 25 (6th Ed.), commonly called the fourteen-day act, will not on that account be refused.

But if he has voluntarily gone into bankruptcy under the United States law, and has assigned all his property to the assignee in bankruptcy, he cannot be discharged from arrest under the fourteen-day act.

There is an irreconcilable conflict between the federal system of bankruptcy and the State insolvent laws, and the latter are obliged to yield.

Matter of Fitzgerald.

Motion for discharge from imprisonment under the "14 day" act.

Daniel H. Fitzgerald brought an action for libel in the New York supreme court, Onondaga county, against H. K. & F. B. Thurber, which was tried there in May, 1875, and resulted in favor of the defendants, who obtained a judgment against the plaintiff for the costs of the suit, which amounted to \$261.73.

An execution having been issued in the city of New York on said judgment, against the person of Fitzgerald, he was arrested thereunder, August 21, 1878, and gave bail for the limits.

On the 30th of the same month, he was adjudicated a bankrupt on his own petition, by the United States district court for the eastern district of New York, and an assignee was thereafter duly appointed and qualified.

This application was made by him on November 8, 1878, for his discharge, under article 6, title 1, chapter 5, part 2, of the Revised Statutes (3 R. S. 25, 6th Ed.).

The aforesaid judgment-creditors opposed the application, because, having made an assignment to the assignee in bankruptcy of all the non-exempt property he had at the time of his arrest, he could not possibly comply with the law which required that in order to be discharged from arrest he should assign that very property for their exclusive benefit.

Childs & Hull, for the motion, cited *Matter of Jacobs*, 12 *Abb. Pr. N. S.* 273; *Shears v. Sollhinger*, 10 *Id.* 287; *Maas v. O'Brien*, 14 *Hun*, 95, 98.

Nelson Smith, opposed.

VAN HOESEN, J.—It is true, that if it should appear that without any fault on his part and against his will all the property which he had at the time of his arrest had been taken away from him, whilst imprisoned, the

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court would not refuse him a discharge. But he is in no such situation. His property was assigned by him of his own free will, with a view to his own personal advantage. It was assigned in a lawful manner, and in conformity with the bankruptcy act ; but by his going into bankruptcy there was an election on his part to get the benefit of a discharge from his debts in bankruptcy, instead of a discharge from imprisonment in the action between himself and the Thurbers. Having made that election, he can only get such relief as the bankruptcy courts can afford him. He cannot put it out of his power to obey the orders of the State court, and then ask that court to discharge him from imprisonment. It is his own act that has made it impossible for him to execute an assignment that will be any more than a nugatory formality. In *Dieckerhoff v. Ahlborn* (2 *Abb. New Cas.* 373), Ahlborn, an imprisoned judgment-debtor, who, after his arrest under an execution from a State court was adjudicated a bankrupt, found it necessary to obtain from the United States court an order annulling the adjudication of bankruptcy for the purpose of obtaining his discharge from imprisonment. The same course is open to Fitzgerald, though he is, of course, at liberty to continue his proceedings in bankruptcy, and to obtain such relief as a discharge in bankruptcy will afford him.

The case of *Maas v. O'Brien* (14 *Hun*, 95), goes far to support the position that the State court should not entertain such proceedings as these after an imprisoned debtor has resorted to the United States courts. There is an irreconcilable conflict between the federal system of bankruptcy and the State insolvent laws, and the latter are compelled to yield. When the federal courts lay their hands upon the property of an insolvent, it is impossible for the State courts to carry the insolvent laws into execution. It is folly for a State court to attempt to execute a part of the provisions of the

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State statute after a United States court has taken under its exclusive control the insolvent's estate, and thus prevented the carrying out of the provisions of the statute which are essential to the completeness of the system.

The views I have expressed are not novel. They are in full accord with the decision in the People *ex rel.* Galsten v. Brooks (40 How. Pr. 165).

The application for a discharge is denied.

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N. Y. Supreme Court, Third Department, Third District; Circuit, January, 1879.

JAIL LIBERTIES.—SURETIES.—SHERIFF.—ESCAPE.—JAILER.

When a prisoner, held on execution in a civil action, gives the sheriff a bond for the liberties, permission given to him by the deputy-sheriff and jailer to leave the liberties, is a defense to an action by the sheriff against the sureties.

So held, although the deputy and jailer never held the process, nor had been specially requested to do anything under it, and was not present when the bond was taken, and the prisoner had never been, by any specific order, placed in his actual custody or care.

A prisoner, who is given the liberties of a jail upon the execution of the statute bond, is not so fully and completely committed to the keeping of his sureties, as to relieve the sheriff from his custody, and the jail from one of its occupants.

It is true that the sureties, on a bail bond for the limits, cannot be exonerated by the mere word or direction of an under officer, who does not hold the process, and has been charged by the sheriff with no duty under it; but they may be exonerated by the act of one who has a general power, flowing from the appointment he holds, as in the case of a jailer.

Motion for judgment upon a special verdict.

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This was an action by John Wemple, as sheriff, against John Glavin and Roger Horan, arising out of the following facts.

On December 20, 1877, George Eisinger recovered a judgment in this court against John Savage, in an action for assault and battery, for the sum of \$2,130.88.

February 21, 1878, an execution against the person of the defendant Savage was issued on such judgment, and delivered to the plaintiff, as sheriff of Albany county. On March 1, of the same year, the plaintiff, by his under-sheriff, Joslyn Nodyne, arrested Savage, who thereupon caused a bond for the jail limits to be executed by Glavin and Horan, the defendants in this action, to the plaintiff, as sheriff of the city and county of Albany, whereupon Savage was admitted to the liberties of the jail.

April 2, 1878, Eisinger brought an action against the plaintiff (Wemple) for the escape of Savage from the jail limits. The defendants (Glavin and Horan) had notice of the action, but the same was not defended, and on April 30, Eisinger recovered in such action a judgment against Wemple for \$2,168.69.

The present action was brought by the plaintiff against the defendants, as sureties upon the bond given by Savage for the liberties of the jail, for the escape of Savage therefrom.

On the trial of the action the defendants set up two defenses. 1st, That when the bond was executed by the defendants they were informed by both the under-sheriff and the deputy-sheriff taking it, that the legal effect of the instrument was, that the defendant Savage should remain a faithful prisoner within the limits of said jail for thirty days only, on the faith of which its obligations were assumed; and, 2d, That at the expiration of such thirty days, Savage left the jail limits by the express consent and permission of Peter A.

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Crounse, who was a deputy-sheriff, and also the keeper of the jail appointed by the plaintiff, upon Savage making and leaving with such deputy and jailer, as required by him, an affidavit to the effect that he, Savage, was a married man, having a family for which he provided, and that he had been a prisoner for the space of more than thirty days.

The court propounded two questions for the jury to answer. The first involved the defense, which related to the transactions at the time the bond was given, and the second to the alleged consent given by Crounse, the deputy and jailer, to the escape of Savage. The first question was answered in favor of the plaintiff, and against the defendants, and the second against the plaintiffs, and in favor of the defendants.

Upon the rendition by the jury of their verdict, which was simply in the form of written answers to the two interrogatories before stated, which were propounded in writing, it was agreed that the questions of law which such answers involved should be argued at a subsequent day, and after hearing such argument, the court should direct the entry of a general verdict, as if found by the jury, in accordance with its judgment upon the merits thereof—the party against whom such decision was, to have the benefit of an exception to the merits of the legal question upon which such decision depends.

H. Smith and N. C. Moak, for plaintiff.

E. Countryman and J. H. Wood, for defendants.

WESTBROOK, J.—[After stating the facts.]—The argument of counsel has been heard, and the point involved is this: When a party, arrested upon an execution issued upon a judgment recovered in a civil action, gives, to the sheriff holding the process, a bond

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for the liberties of the jail, and leaves such limits by the permission of the deputy and jailer of the sheriff, is such permission of the deputy and jailer an answer and defense to an action brought by the sheriff against the sureties upon such bond for an escape?

In the discussion of the question just stated, the following facts must also be borne in mind: Crounse, the deputy and jailer, who gave Savage permission to escape, never held the process under which the arrest was made; neither had he been specially requested either by the sheriff or any other person to do a single thing under it; nor was he present when the bond was taken, and Savage had never been, by any specific order, placed in his actual custody or care. If Crounse had anything to do with Savage, either upon the original arrest, the taking of bail, or his care while upon the limits, such power was conferred upon him, not by the possession of any process, not by any special order, not by any special act actually done, but only and solely because he was the deputy and jailer of the plaintiff.

The point which the case presents is certainly an important one, and to my mind somewhat difficult of solution. I concede the rule to be, as claimed by the counsel for the plaintiff, that a sheriff is not responsible for an act which an individual, who happens to be his deputy, may do, unless in the act done the under officer represented the sheriff, the ordinary evidence of which would be either the possession of process intrusted to him for prosecution, or a special authority to do the particular act. The right, however, of the deputy to represent his superior officer, and the consequent responsibility of the latter for the act of the former, may also exist and be evidenced, when the deputy has neither a process nor special authority, by an appointment which makes him the representative

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of the sheriff in a certain line of business to which the act complained of legitimately belongs ; but to insure the liability of the sheriff, one at least of these three grounds must be proved—possession of process, special authority, or general power covering the particular thing done.

Tested by this rule, if Crounse was only the deputy of the plaintiff, the departure of Savage from the jail limits of the county of Albany by his consent would, probably, have afforded no protection to the defendants. Crounse had not arrested Savage, nor did he hold the process against him. Neither had the sheriff given him any special direction to take charge of Savage, nor as simple deputy-sheriff did he have any control of prisoners committed. If, then, the liability of the plaintiff for the acts of Crounse depended only upon the fact that the latter was his deputy, this case differs from that of *Hopkinson v. Leeds* (78 *Penn. St.* 396). In that case, the deputies who allowed the defendant in the execution to escape, as would seem from the report, not only held the process, but also acted under special instruction from the sheriff. Crounse, however, was not only the deputy of the plaintiff, but was also the keeper of the jail of the county of Albany, by the written appointment of the sheriff, and acting as such ; and this case, therefore, presents not only the responsibility of the plaintiff for the acts of Crounse, founded upon the fact that he was a deputy-sheriff, but also that based upon his appointment by the plaintiff to the position of keeper of the county jail. To this point the discussion must next be directed.

The statute (1 *R. S.* 6th ed. p. 907, § 235), after making a special provision in regard to the city and county of New York, declares: "And the sheriff of every other city and county of this state shall have the custody of the jails and of the prisoners thereof, and

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the prisoners in the same. And the sheriffs respectively may appoint keepers of such jails and prisons, for whose acts they shall severally be responsible.”*

By repeated adjudications in this State (*Dole v. Moulton*, 2 *Johns. Cas.* 205, 8; *Peters v. Henry*, 6 *Johns.* 121; *Jansen v. Hilton*, 10 *Id.* 550, 561; *Barry v. Mandell*, *Id.* 563, 583), the jail limits are to be deemed a part of the jail itself, as much so as if the actual prison walls were extended to the boundaries of such limits. From these decisions it necessarily follows, and so, in fact they expressly hold, that a defendant arrested upon execution issued upon a civil judgment, though entitled, on giving a sufficient bond, to the liberties of the jail (3 *R. S.* 6th ed. p. 719, § 61),† is, nevertheless, still a prisoner and within its jail, though admitted “to the liberties” thereof. The condition of the bond also required to be given, and given in this case, strengthens the argument, which is, “that he shall remain a *true and faithful prisoner*,‡ and shall not at any time, or in any manner, escape or go without the limits and boundaries of the liberties established for the jail of such county, until discharged by due course of law.” As Savage, then, was a prisoner, and within the jail (for the limits are a part of the jail), who had the care and custody of him? The process which held him was in the office of the sheriff, and though Crounse did not have it in his own hands, and though he was acting under no special order, yet being the keeper of the jail of the county, and of every part of it, he also necessarily was the keeper of Savage, who was a prisoner thereof.

* Compare the present statute, *Code Civ. Pro.* §§ 133, 155, 158, 160-171.

† *Code Civ. Pro.* § 157.

‡ The words in italic are omitted in the revision, *Code Civ. Pro.* § 150, but without intent to alter the construction.

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During the trial, and upon the argument of this cause, after verdict, I confess that I did not see how the permission given by Crounse to Savage to leave the jail limits, could avail the defendants as a defense. The reasoning which led to that impression, however, was founded upon the rights and duties devolving upon the former as a deputy-sheriff only, and those flowing from his position as jailer, also, were overlooked. After my attention was directed to the fact that Crounse was the plaintiff's keeper of the county jail, and therefore must have been the keeper of the defendant in the execution, as one of its inmates, the force of the argument founded thereon could not be resisted. It is undoubtedly unfortunate for the sheriff to lose so large an amount as this action involves, but would it not be equally unfortunate for these defendants, if they, in his stead, are to be the sufferers? Where should they have gone for information, at the end of what they supposed to be the term of Savage's imprisonment, but to him in whose custody, as keeper of the jail, the defendant in the execution was? If a mistake was made in the advice given, who should bear its consequences, the party who placed Crounse in a position where his advice was likely to be followed, or those who acted upon it? In using this argument, I am aware that the testimony was very conflicting, and that there may be some doubt if the weight of the evidence justifies the finding of the jury. That question, however, is not now before me. The jury have found, in answer to a plain question propounded, that the sheriff's jailer, who in law had the custody of Savage, made the mistake of supposing that the provisions of the statute, in regard to the discharge of persons imprisoned under civil process issued by justices of the peace, were applicable to his (Savage's) case, and on compliance therewith consented to the discharge of the imprisoned

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debtor. For this act, the plaintiff must be held accountable, not only because reason and justice unite in declaring that a public officer should have no redress against parties for an act done by the advice and consent of a sub-officer, placed by him over them, but also because the statute under which Crounse held his appointment as keeper of the county jail, whilst it provides that the sheriffs of the various counties of the State, except the city and county of New York, "shall have the custody of the jails and of the prisoners *thereof* and the prisoners *in* the same;" and that they "respectively may appoint keepers of such jails and prisons;" also distinctly declares the responsibility of the sheriff for the acts of his keeper, in these plain words: "for whose (the keeper's) acts they (the sheriffs) shall severally be responsible."

In answer to this argument, that after the giving of a bond for the liberties of the jail, the defendant was still a prisoner *of* or *in* the jail, and as such necessarily in the custody of the sheriff or his jailer, it is said that the force of the bail bond is overlooked. It is claimed that when a prisoner gives bail he is taken from the custody of the sheriff and given to his bail, who thenceforth become his jailers, in place of the sheriff—the latter no longer having the keeping of the prisoner, unless he shall again be surrendered to the sheriff, in the manner prescribed by statute. In support of this proposition several authorities are cited, and among others *Nicolls v. Ingersoll*, 7 *Johns.* 155; *Crocker on Sheriffs*, § 137; 1 *Waif s Pr.* 671; *Appleby v. Robinson*, 44 *Barb.* 316; *Holmes v. Lansing*, 3 *Johns. Cas.* 73; *Allen on Sheriffs*, 132, 213.*

If the cases referred to are examined, and their soundness is not questioned, they will be found to be

* See also *Code Civ. Pro.* § 158.

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of a class in which the sheriff's responsibilities cease with the perfection of bail. It is not, however, a sound legal proposition, that a prisoner, who is given the liberties of a jail upon the execution of the statute bond, is so fully and completely committed to the keeping of his sureties as to relieve the sheriff from his custody and the jail from one of its occupants. In a more limited sense, the bail do have him in keeping, and that position they must occupy to enable them to fulfill their contract with the sheriff, to which allusion has already been made ; but, it is likewise true, that the party who has given bail is still, also, in the eye of the law, within the prison, and, *ex necessitate*, by the words of the statute, already cited (1 *R. S.* 6th ed. p. 907, § 235), the sheriff has him in actual custody. All legislation in regard to prisoners who have given bonds for the jail limits, and the liability of the sheriff for their escape, proceeds upon the theory that the sheriff has them still in charge and in actual confinement (3 *R. S.* 6th ed. pp. 713, 714, §§ 18, 19, 20). The bond to be given, as previously stated, is conditioned that the party "shall *remain* a true and faithful *prisoner*" (3 *R. S.* 6th ed. p. 719, § 16) in that which is a part of the prison itself, and therefore *of* the sheriff, both by reason of the fact that the statute makes that officer the keeper "of the prisoners *thereof*, and the prisoners *in* the same" (1 *R. S.* 6th ed. p. 907, § 235), and the further fact that he is also made liable for an escape—a liability most unjust, unless the escape is from his immediate custody.

All the cases, too, which hold the prison limits to be simply an extension of the prison walls, some of which are hereinbefore cited, recognize and establish the position taken in this opinion, that the prisoner who has given a bond for the liberties of the jail is still in the keeping of the sheriff. Thus, in *Seymour v.*

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Harvey (8 Conn. 63, on page 70), DAGGETT, J., in construing an instrument alleged to have been given for the liberties of the jail, and objected to because the condition was "if he shall well and truly keep himself *within* the said prison," &c., said: "The true construction, however, is, that the prisoner was to enjoy, as the case finds he did, *the liberties of the prison*. It is the settled doctrine on this subject, that the liberties of the prison is an extension or enlargement of the walls of the prison. A person, therefore, is in prison, in legal contemplation, when within the liberties of the prison. An escape from the liberties, is an escape from the prison. In this view, the objection vanishes." In *Dole v. Moulton and others* (2 Johns. Cas. 205), on page 207-8, the court, per LANSING, Ch. J., says: "In all cases, therefore, where the security is offered, the walls of the prison, according to the ancient law, are enlarged to the extent of the limits assigned, by the statute; and the law concerning escapes must, without doubt, apply to the limits, in the same manner as it formerly applied to the four walls of the prison (2 Term Rep. 131). So that the limits are to be considered, in such case, as the prison." *Jansen v. Hilton* (10 Johns. 549), and *Barry v. Mandell* (10 Johns. 563), maintain the same doctrine, but they also go further, and decide, that when the prisoner leaves the liberties of the jail without the consent of the sheriff, the latter may pursue and retake him, a power which could not exist, if the effect of the bail bond was to take the prisoner completely from the custody of the sheriff and place him in the keeping of his bail, until such bail again surrendered him to the sheriff, in the manner prescribed by statute.

The conclusion, then, to be drawn from the statutes and the cases is clear. The defendant in the execution remained within the jail of the county of Albany.

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The plaintiff, as sheriff, was primarily his keeper, and, by force of appointment by the sheriff, Crounse, as keeper of the jail, was immediately in charge. Either (the sheriff or jailer) had power to unlock the legal doors leading without and beyond the prison limits. It is true he was committed to his bail, to be detained by them within the jail liberties, as a prisoner of the jail and of its statute keepers, and to do so they had obligated themselves to the sheriff, but they did not agree to keep him there against the acts and will of the sheriff, or those of his under-officer in charge; and when either of them removed the legal barrier to the escape and opened the doors for the departure of the prisoner, as they had full power to do, the liability of the bail ended.

If the exact case before us had never been decided, the principles upon which the direction to enter a general verdict must depend, are so well settled, that I should still, for the reasons stated, feel constrained to order one in favor of the defendants. It is true (to briefly recapitulate the argument) that when parties have made a contract with a sheriff for his protection, as these defendants have done, they cannot be released or discharged therefrom by the mere word or direction of an under-officer, who does not hold the process, and has been charged by the sheriff with no duty under it. In such a case, the under-officer cannot represent the sheriff, because neither process nor order has been given, and no general powers, flowing from the appointment he holds, give him any right to act in that particular case.

In this, however, we have a party who is a prisoner "*in*" the county jail (if effect be given to express adjudications holding that the jail limits are a part of the jail), and if not actually "*in*" the jail, then he was certainly (to use other words of the same section of

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the statute) one "of the prisoners *thereof*;" and of such jail, and, by necessary implication, of its prisoners, Crounse was, by the appointment of the sheriff, the keeper. Towards the imprisoned debtor, the jailer (Crounse) sustained an official relation as his legal custodian for the sheriff whose personal representative he was. It was Crounse's duty to inform the debtor and his sureties what the contract, which the latter made with the sheriff, required, when it declared that such debtor should "remain a true and faithful prisoner;" or if it was not his duty to inform them, it, certainly, cannot be argued or claimed that when such representative of the plaintiff, acting doubtless under a mistake, informed the imprisoned debtor that the contract of the defendants had been fulfilled, and that he was no longer a prisoner, and all act upon the faith of the announcement, that the parties misled by the special representative of the plaintiff should suffer for such act rather than the man who had clothed the mistaken official with the authority which gave to his direction all its potency and effect upon the minds of those to whom it was addressed. This case, however, is not new in any particular, and is precisely identical with that of *Huntington v. Williams and others* (3 *Conn.* 427), to which reference is now made.

The reporter's syllabus of that cause reads thus: "When a person, committed to prison, on execution for debt, having been admitted to the liberties of the prison, on giving bond to remain a faithful prisoner, departed from the liberties, with the consent and approbation of the gaoler; it was held, that the sheriff could not recover on the bond; a prisoner on the limits being in the custody of the gaoler; and the acts of the gaoler, in relation to such prisoner, being imputed to the sheriff."

A careful perusal of that case has failed to discover

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any point of dissimilarity between it and the one under consideration. Like this, it was an action by the sheriff against the sureties upon a bail bond given by a prisoner for the liberties of the jail ; and the defense was that the escape was by the permission of the jailer appointed by the sheriff. The statute of Connecticut giving a sheriff the power to appoint a jailer (see p. 430 of 3 *Conn.*) was no broader than ours, and did not, as ours does, by express words declare the liability of the sheriff for the acts of the keeper. It nowhere is stated in the report that the key of the actual prison door was ever turned upon defendant in the execution by the jailer, any more than it was upon Savage in this, and if it had ever been so turned, after the release of the prisoner from the walls of the prison to the liberties of the jail on bail, the fact of actual confinement once would not add to the power and duties of the jailer over him. Neither is it stated that the keeper had the process or had received any special authority from the sheriff in the premises. On the contrary, from the argument of the sheriff's counsel, it would seem that the keeper in that case occupied the same position towards the imprisoned debtor that Crounse did towards Savage in this, for they expressly say : " Stroud had no authority, except what resulted, by implication of law, from his office of keeper of the gaol. There was no *express* delegation of power. The appointment was the only fact, from which any power could be inferred." This statement could not have been true, if the process was in the hands of Stroud, or if the defendant therein had been specially committed to his care. It is true that in the opinion of the judge (p. 430) the form of the verdict is given, in which it is stated, " '*Richard Stroud* was keeper of the gaol, by the plaintiff's appointment,' and as such, ' had the charge and custody of said *Randall* ' at the time of his

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escape," but it is also true that the whole court, per HOSMER, Ch. J., said, "Waiving, however, the exclusive effect of this finding, and admitting, that *Stroud* was appointed, *in totidem verbis*, keeper of the gaol, the consequence is irresistible, that the gaoler was invested with all the authority of his principal." It is evident from this language, and the whole report of the case, that the jury, when they found that Stroud "had the charge and custody of said Randall at the time of his escape," found it, not as an independent fact, but as the legal conclusion resulting from another fact, to wit, that Stroud was the keeper of the jail by the appointment of the sheriff, and by virtue thereof, in law, was to be deemed in charge of the prisoner. The opinion reaches the conclusion that the sheriff could not recover by precisely the same reasoning which has been given in this opinion as controlling my own judgment and action, and thus fortifies and sustains not only the result which I have reached, but the mental process by which it has been attained.

The clerk will enter in this cause, as if found by the jury, a verdict in favor of the defendants. In pursuance of the stipulation in open court, the plaintiff, if he makes a case for review, will be entitled to insert therein an exception to the order of the court directing such verdict, such exception, however, to be in such form as only to raise and present the legal question, which the opinion has discussed.

Hall v. Waterbury.

HALL v. WATERBURY.

*N. Y. Common Pleas ; Trial Term, February, 1879.*ATTACHMENT.—BANKRUPTCY.—LIABILITY OF PARTY FOR ACTS OF A
PUBLIC OFFICER.

The plaintiff in a regular attachment, which is dissolved by the operation of the bankrupt law,* is not liable for the failure of the attaching officer to surrender the goods, in the absence of any evidence of conversion by him, or that he authorized or ratified the officer's default.

The officer becomes the agent of the party suing out process, only where the process is irregular, unauthorized, and void.†

Motion by defendants for new trial.

This was an action by E. Stanley Hall, assignee in bankruptcy of Henry L. Hewlett, against Waterbury, Smith & Co. and Joseph Phillips, for the value of certain property of said assignee.

In April, 1875, Waterbury, Smith & Co. obtained an attachment in the marine court against the property of Henry L. Hewlett, a resident of New Jersey, but then engaged in business in New York city. In May, 1875, Hewlett filed a voluntary petition in bankruptcy, and Mr. Hall, the plaintiff, was elected assignee of his estate. The assignee demanded a return of the property taken under the attachment, on the ground that the bankruptcy proceedings dissolved the attachment, and the attaching creditors offering no objection, the city marshal to whom the process of attachment had been issued was instructed to return the property to the assignee, which he claimed to have done.

The assignee, however, maintained that about \$1,100 worth of property was missing, and sued Waterbury, Smith & Co. and Phillips, the city marshal, for the same.

* *U. S. R. S.* §§ 5128 and 5129.† Compare *Murray v. Bininger*, 3 *Abb. Ct. App. Dec.* 336.

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At the trial a verdict was rendered against all the defendants, and the defendants Waterbury, Smith & Co. moved for a new trial.

Jacobs Brothers, for defendants Waterbury, Smith & Co. and the motion.

C. J. G. Hall, for plaintiff, opposed.

J. F. DALY, J.—Motion for new trial by defendants, Waterbury, Smith & Co. A verdict was rendered against that firm, and Phillips, a city marshal, for \$200 damages for failing to deliver to plaintiff goods which had been seized under an attachment, the attachment having been dissolved by the operation of the bankruptcy laws of the United States (§ 14, Bankruptcy Act).

The question of the liability of Waterbury, Smith & Co. for the non-delivery of the attached goods was reserved for this motion. They were the plaintiffs in the action in the marine court in which the attachment was issued.

The attachment was regular and was properly issued. It was dissolved by the operation of the bankrupt law, and not for any defect, insufficiency or irregularity. It was not void.

The plaintiffs did not receive any part of the property seized, all of which remained in the custody of the marshal until he gave to plaintiff, as assignee in bankruptcy, an order upon his storekeeper for its delivery.

The plaintiff took what was so delivered, but complained that some portion of what had been seized was missing.

He contends that the plaintiffs in the attachment are responsible for the missing portion on the ground that the marshal was their agent.

The officer becomes the agent of the party suing out process only where the process is irregular, unauthor-

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ized and void (Kerr v. Mount, 28 N. Y. 659). But the officer is in no sense the agent of the party where the process is authorized and regular (Raney v. Weed, 3 Sandf. 577). In such case the party is not liable for the wrongful or negligent acts of the officer, unless express authority or ratification can be shown.

The authority from the party to the officer which the law implies is "only co-extensive with that conferred by the warrant, and to do only lawful acts pursuant to the process" (Welsh v. Cochran, 63 N. Y. 184). In the warrant issued by the defendants Waterbury, Smith & Co., to the defendant Phillips, the marshal, the latter was directed to "attach and safely keep" the property of Hewlett, the defendant in the process. So far as taking the property was concerned, the marshal acted under his warrant as directed, but he was to do more, "to safely keep" the property attached, and only by keeping safely, as well as taking, would the marshal perform his duty and fulfill his instructions.

If the marshal suffered any part of the property to be lost, or if he converted any of it to his own use, he did not obey, but disobeyed the warrant, and did the opposite of that which he was commanded.

For the breach of his instructions and duty, the plaintiffs in a valid process cannot be made answerable.

The dissolution of the attachment by operation of the bankrupt law did not have the effect of making the attaching creditors trespassers *ab initio* (as in cases where the attachment is vacated for irregularity), and they are not to be held liable in such a case as this, because of their original direction to the marshal to attach the property:

They gave no direction to the marshal afterwards, and had no control of the goods which were in custody of the officer of the law. He and his bondsmen are

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alone liable for his official misconduct in converting a portion of the goods he was directed to keep.

The case of *Wilson v. Brinkman* (2 *Nat. Bank. Reg.* 468), cited by plaintiffs' counsel, is not in point. No question such as arises here was before the court.

The decision is merely that upon the dissolution of the attachment, the sheriff and the plaintiffs are liable in an action for the value of the goods taken, where delivery thereof to the assignee in bankruptcy is refused. There was no refusal in this case. So far as was possible they yielded to the claim of the assignee, and the only goods not delivered were such as the marshal had lost or appropriated in violation of his duty, and contrary to their direction in the process.

These observations apply equally to any claim that defendants, Waterbury, Smith & Co., are liable under the first attachment issued by them, which was vacated by the special term of the marine court, but afterwards reinstated by the order of the general term of that court, reversing the special term order. For the reasons stated on the trial, I held the attachment to be valid and regular.

A new trial should be granted defendants, Waterbury, Smith & Co. Costs to abide event.

STIMSON v. ARNOLD.

N. Y. Supreme Court, Third Department, Third District; Special Term, June, 1878.

APPORTIONMENT.—FORECLOSURE OF MORTGAGE.—VESTING OF TITLE
ON FORECLOSURE SALE.

Where a judgment of foreclosure and sale provides that the surrender of possession can only be *required* on the exhibition of the deed, that formality may be waived by the party in possession. The actual title passes on the delivery of the deed; and the surrender of

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possession as of that day may be inferred by the jury, from the acts of the parties.*

If the change of title and possession are accomplished intermediate the periods for the payment of storage for goods on the premises, and there is no agreement for apportionment, storage payable subsequently to the change, although partly for a period previous thereto, is payable to the purchaser.†

Motion by plaintiff for a new trial upon the judge's minutes.

The action was brought by Frank C. Stimson against Collins Arnold to recover the value of the

* Compare on this subject, besides the cases cited in the text, the following, viz.: *Kable v. Mitchell*, 9 *W. Va.* 492, 514; *Armstrong v. McClure*, 4 *Heisk. (Tenn.)* 80; *Bowery Savings Bank v. Richards*, 3 *Hun*, 366; 2 *Jones Mortg.* §§ 1659, 1666; *Freeman on Executions*, § 311; *Terpenning v. Agricultural Ins. Co.*, 14 *Hun*, 299; *Farmers' Mutual Ins. Co. v. Forney*, 1 *Leg. Chron.* 270.

† As to apportionment under a written instrument, compare *L.* 1875, p. 616, c. 542, which provides as follows, viz.:

"Section 1. All rents reserved on any lease granted after the passing of this act, and all annuities, dividends and other payments of every description, made payable or becoming due at fixed periods under any instrument executed after the passing of this act, or (being a last will and testament) that shall take effect after the passing of this act, shall be apportioned, so that on the death of any person interested in any such rents, annuities, dividends, or other payments as aforesaid, or in the estate or fund from or in respect of which the same shall issue or be derived, or on the determination by any other means whatever of the interests of any such person, he or she, and his or her executors, administrators or assigns shall be entitled to a proportion of such rents, annuities, dividends and other payments, according to the time which shall have elapsed from the commencement or last period of payment thereof respectively (as the case may be), including the day of the death of such person, or of the determination of his or her interest, all just allowances and deductions on account of charges on such rents, annuities, dividends and other payments being made."

Section 2 provides for the recovery by representatives, and section 3 declares its inapplicability to insurance policies.

As to apportionment of rent to representatives of a tenant for life, see *Betts v. Betts*, 4 *Abb. New Cas.* 416.

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storage of certain machinery in the Clifton Mills at Cohoes, by the plaintiff's assignor for the defendant. The assignor had been in the occupancy of the mills under a lease, and whilst so occupying, the defendant, by an agreement with him, was permitted to leave certain machinery, originally belonging to said mill, and which he had purchased, in said mill, on storage. The defendant paid for storage to the assignor of plaintiff, up to December 9, 1876.

On August 29, 1876, a decree of foreclosure of a mortgage, antedating the lease of plaintiff's assignor, and covering the said Clifton Mills, was obtained. Under such foreclosure decree the premises were sold September 28, 1876, to William White, as trustee for the Home Savings Bank, and on December 20, 1876, a deed was delivered. The order confirming the sale was entered February 27, 1877. After December 9, 1876, the defendant declined to pay storage to the assignor of plaintiff, and paid to the purchaser.

On December 27, 1876, the purchaser at the foreclosure sale went to the mill, and assumed to take possession. He did not, however, see the assignor of the plaintiff, who was absent. Large and extensive repairs were subsequently made by the purchasers upon the premises, the assignor of the plaintiff superintending them, but there was no formal demand of possession, nor exhibition of deed to him until November, 1877. The defendant claimed, however, that the possession of the purchasers had been fully recognized by plaintiff's assignor, long prior to that date.

The court charged the jury that the purchaser at the foreclosure sale could not, from the language of the decree, have required the possession of the mill against the will of plaintiff's assignor without a formal demand thereof, and an exhibition of the deed, but it was, nevertheless, competent for him to make such surrender voluntarily, and to recognize the title of the

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purchaser and his possession as of a prior date, and that up to the time when such possession was acquired, or up to the date at which the plaintiff's assignor recognized the possession of the purchaser as commencing, if he did so, the plaintiff could recover. The jury found for the defendant. The plaintiff insisted that in any event he was entitled to recover storage between December 9, 1876, and the 20th of the same month.

George L. Stedman, for plaintiff:—The verdict was against the evidence. The plaintiff was entitled to judgment for storage from December 9, 1876, to the time of the execution and delivery of the deed. It is probable that the terms of sale did not contemplate a deed until it was given, and that the money therefore was not paid until then (*Mitchell v. Bartlett*, 52 *Barb.* 319, p. 327). The plaintiff was entitled to judgment for storage from December 9, 1876, to the time of the presentation of the deed by White upon the premises, December 27, 1876. Same as to confirmation, February 27, 1877. He was also entitled to judgment for storage from December 9, 1876, to the time Stimson surrendered or attorned to White. This, by all the evidence, was at least not until March, 1877. The theory upon which the court submitted the question of recovery to the jury (aside from the question of amount), was that Stimson had surrendered. He was a tenant of the mill, and in charge of the goods until he did so surrender. His assignee is entitled to be paid for this (*Clason v. Corley*, 5 *Sandf.* 447; *Astor v. Turner*, 11 *Paige*, 436; *Jackson v. Colden*, 4 *Cow.* 270, 274). The court erred in submitting to the jury the question whether or not the plaintiff was entitled to recover at all. It should at least have instructed the jury that plaintiff was entitled to recover for one of the periods above named. It also erred in refusing to instruct the jury that Stimson was a tenant of the Clifton Com-

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pany up to the time of the production of the deed and certified copy, and liable for rent up to that time : and in refusing to instruct the jury that the plaintiff was entitled to recover from December 9, 1876, up to March, 1877.

Nathaniel C. Moak, for defendants :—A deed in a foreclosure sale passes the title immediately on delivery, without waiting for a report of sale and an order of confirmation (*Mitchell v. Bartlett*, 51 *N. Y.* 447 ; *Fort v. Burch*, 6 *Barb.* 60, 76 ; *Cheney v. Woodruff*, 45 *N. Y.* 98 ; *Fuller v. Van Geesen*, 4 *Hill*, 171 ; 1 *Jones on Mort.* §§ 775, 777 ; *Thomas on Mort.* p. 367, 369, 374 ; *Whalin v. White*, 25 *N. Y.* 462-3). An attornment to a mortgagee or one claiming under same title is valid (1 *R. S.* 744, § 3 ; 1 *Edm. St.* 696). Plaintiff's assignor having once recognized the possession of the purchaser could not afterwards repudiate such recognition (*Brown v. Dawson, Arnold & Hodges*, *Q. B.* 114). When the order of confirmation was entered, it related back to the time of the giving of the deed (*Fuller v. Van Geesen*, 4 *Hill*, 171 ; *Fort v. Burch*, 6 *Barb.* 75-6 ; *Mitchell v. Bartlett*, 52 *Id.* 327, *affi'd* 51 *N. Y.* 447, 451). The acts of parties may amount to a confirmation and a recognition of title (*Gowan v. Jones*, 18 *Miss.* 168 ; *Roper on Jud. Sales*, § 125). The sale under the foreclosure entitled the purchaser to the rents (*Wintermute v. Light*, 46 *Barb.* 278, 283).

WESTBROOK, J.—[After stating the facts.]—As the decree of foreclosure provided that the surrender of possession could only be *required* on the exhibition and presentation of the deed, possession could not have been earlier *compelled* (*Mitchell v. Bartlett*, 51 *N. Y.* 447). That formal mode of obtaining possession, however, the party in possession could waive. The deed was dated December 20, 1876, and the actual title then passed (*Fuller v. Van Geesen*, 4 *Hill*, 171). The stor-

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age for the month, which *commenced* in December, 1876, having been paid up to the ninth of that month, did not, according to the evidence of the plaintiff's assignor, become due until ten days before its expiration, which was January 9, 1877. The jury have found that by the agreement of the plaintiff's assignor and the purchaser, as evinced by the course of their dealings and acts, the possession and rights of the latter attached on the day of the date of the deed, which was December 20, 1876. No storage became due until after that time, and as there was no agreement for its apportionment, it was properly payable to the purchasers, whose rights and possession began, as the jury has found, December 20, 1876 (*Zule v. Zule*, 24 *Wend.* 76).

Without any elaborate discussion of the evidence, which is unnecessary upon this motion, I content myself with the general statement, that there was sufficient evidence to submit the question to the jury, whether or not the plaintiff's assignor had recognized the purchaser's rights as taking effect December 20, 1876. At all events, there clearly was evidence to submit to the jury, that the purchaser took actual possession December 27, 1876, and that from that date his actual possession was recognized and acquiesced in. This would still be prior to the maturity of any claim for storage, and therefore such compensation for storage was payable to the purchaser. The jury having answered all questions of fact in favor of the defendant that actual possession was not in plaintiff's assignor when storage became due, it followed that storage, which became due thereafter, belonged to the purchaser at the foreclosure sale, and that defendant was entitled to a verdict.

Motion for a new trial denied with costs.

People *ex rel.* Murphy v. Kelly.

PEOPLE *ex rel.* MURPHY v. KELLY.*N. Y. Court of Appeals ; March, 1879.*

MUNICIPAL CORPORATIONS.—STATUTES.—PUBLIC WORKS.—POWER OF
CONGRESS OVER BRIDGES.—LIMIT OF COST, AND LIMIT
OF APPROPRIATION.—CONSTITUTIONAL
LAW.—MANDAMUS.

Congress, in the exercise of its power to authorize the erection of a bridge over navigable waters, even though it may, to some extent, impede navigation, may devolve upon a public officer the power to approve or prescribe the plan of the structure,* subject to the authority of Congress to modify the same (pp. 441).

Under a statute requiring the secretary of war to give notice to the bridge company if he approved the plan, and authorizing them, on receiving such notice, to proceed with its erection, he may convey such notice in any way which is effectual; and a communication to their president purporting to be by direction of the secretary of war, and signed by a subordinate officer, is sufficient † (pp. 441, 442).

The constitutional amendment declaring that "no county, city, town, or village shall hereafter give any money, or property, or loan its credit to or in aid of any individual, association, or corporation, or become directly or indirectly the owner of stock in or bonds of any association or corporation" (L. 1874, p. 933, same provision, 1 R. S. 6th Ed. 102, section 11), does not forbid the legislature to enact a statute authorizing one or more municipalities which are already stockholders in a corporation for the construction of a public work, to become the entire owners of the work, by agreeing on a dissolution of the corporation, and retiring by purchase the stock of other stockholders (pp. 443-445).

* Where the duty of maintaining a bridge over a railroad rests upon the company, an act of the legislature empowering the common council of the city where the bridge was situated to require the company to widen it as public convenience should require, is not objectionable as delegating authority to an interested tribunal. The council, even if acting as agent of the city, would not be interested, but it is the agent of the law, and not of the city. *English v. New Haven, &c. Co.*, 32 Conn. 240.

† The form is not to be too closely regarded. Thus, a vote of a town to build a bridge, has been held equivalent to an "application" to the supervisors. *Bergen v. Gubna*, 10 Hun, 11.

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The constitutional amendment, declaring "nor shall such county, city, town or village be allowed to incur any indebtedness, except for county, city, town, or village purposes" (*L. 1874, p. 933, same provision, 1 R. S. 6th Ed. p. 102*), does not forbid a statute authorizing two cities to construct a public bridge connecting them (*p. 446*).

It is not essential, to constitute a "city purpose," that the work should be wholly within the city limits. It is enough if the improvement be for the common and general benefit of all the citizens, as distinguished from an external work, from which only incidental benefits to the municipality may flow (*p. 447*).

A bridge connecting two cities is a city purpose for each, within the constitutional provision (*p. 448*).

It is for the legislature to determine, in the first instance, what is a "county, city, town, or village purpose," within the meaning of the constitution; and although their determination is subject to the power of the judiciary to decide the constitutional question, yet the legislative act should not be declared unconstitutional, unless the purpose appears clearly to be one not authorized (*p. 449*).

A statute will not be declared unconstitutional in its main provisions, by reason of the existence of a questionable clause, which might be stricken from the act without impairing any of its essential provisions or affecting its purpose (*p. 449*).

A State statute authorized the erection of a bridge, to be so constructed as not to obstruct the free and common navigation of the river; a subsequent act of congress sanctioned the bridge to be constructed, provided that it be so constructed as not to obstruct, impair, or injuriously modify the navigation of the river, and submitted the plans to the approval of the secretary of war; to secure this condition. After he had approved a plan of structure, the State legislature passed another act, authorizing the completion of the structure. *Held*, that this was an approval of the plan, and a structure in conformity thereto could not be judicially condemned on the ground that it would be an obstruction to navigation (*p. 450*).

The comptroller of the city of New York is not justified in refusing to provide the means required pursuant to the statute, by alleging that the trustees of the bridge have departed from the plan prescribed pursuant to law, are extravagant in the expenditure, and that the bridge will prove unsafe and useless (*p. 451, 452*).

In a statute conferring the power and duty to construct a public work, according to a designated plan, with a separate clause authorizing the board, charged with the duty, to call on the municipalities concerned, for such sums as they deem proper for the expenses, provided the amount to be paid shall not exceed a specified sum, the

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sum limited does not imply a limit on the entire cost of the work.*

A statute (L. 1875, c. 300), entitled as an act "for the completion" of a bridge in the course of construction between the cities of New York and Brooklyn, provided that "the expense of constructing and maintaining the same, and acquiring the land necessary therefor, and all liabilities imposed upon them or incurred by them by virtue of this act shall be defrayed by the said cities, in proportion of two third parts by the city of Brooklyn, and one third part by the city of New York; and for such purpose the said trustees shall, from time to time, as they shall deem necessary, call upon the said cities by request made to the mayor and comptroller thereof respectively, for such sums as they shall deem proper in the proportions above mentioned, provided, however, that the whole amount to be paid by both cities shall not exceed \$8,000,000, and the city of New York shall not be called upon to pay a greater sum than \$1,000,000 in any one year, and the city of Brooklyn not more than \$2,000,000 in any one year, until the said bridge shall be fully completed and open for public travel; and the debts and liabilities incurred therefore shall be fully paid; and the said cities of New York and Brooklyn are hereby authorized and required from time to time to issue bonds bearing interest not to exceed seven per cent. per annum, for the purpose of meeting the requirements of the said trustees, and to pay the proceeds thereof to them.

Held, that the limitation was not a limitation on the entire cost, but only on the appropriation (p. 455).

The common council of the city of New York passed an ordinance authorizing and directing the comptroller to issue the bonds required; but before he had done so, they passed a resolution requesting him to withhold the issue of bonds until the question should be judicially determined. *Held*, that this did not affect his legal duty, but a mandamus might issue (p. 455).

Appeal from an order granting a peremptory mandamus, and reversing an order at special term, which denied writ.

The relator applied at special term of the supreme court, in the first department, for a peremptory writ of mandamus to John Kelly as comptroller, commanding

* See note at the end of the case.
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him to borrow and pay over to the trustees of the New York and Brooklyn Bridge the amount of two calls, each for \$500,000, made by said trustees on the mayor and comptroller of the city of New York in accordance with the provisions of section 3 of chapter 300 of the *Laws* of 1875, stated below.

There were two proceedings taken and carried on *pari passu*. The one was taken against the respondent, Kelly, alone. To the other the mayor, auditor, clerk of the common council, and chamberlain of the city were made parties, because objection was suggested on behalf of the respondent, Kelly, that the application was defective as to parties.

The court at special term held, during the argument, on the question of practice, that the proceeding was well taken against the comptroller alone; but as a matter of precaution and to avoid technical difficulties, appeals were taken in both proceedings. As both applications were made on the same papers, but one record was made on appeal.

A stipulation was given waiving all technical objections, if any, to the proceedings.

The affidavit of the relator, Murphy, set forth that he was president of the trustees of the New York and Brooklyn Bridge, and that the application was made on their behalf and under their direction, and named the persons composing such board; it then recited chronologically the history of the enterprise (see the first part of the opinion by EARL, J., p. 439); and that there was necessary in the year 1878 to defray the expense of constructing the bridge and to discharge debts already incurred by said trustees, in the prosecution of said work, two sums each of \$1,500,000; that in compliance with the statute the said trustees called on the city of New York, by request made to the mayor and comptroller thereof, for one-third of each of said sums; each call being for \$500,000.

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The affidavit further set forth the duty devolved on the city by section 3 of the act of 1875 ; an ordinance of the common council of the city of New York passed May 9, 1876, whereby the comptroller was directed to issue bonds as provided by said section 3, in such form as he might deem proper, and borrow money to comply with the calls of said trustees ; that the amount of money already paid by the city and the amount named in the calls now in litigation together were less than the one-third of \$8,000,000, the limit prescribed by said act ; that the city of New York had failed to comply with said calls, and that the default of the city was caused wholly by the neglect and failure of the respondent, Kelly, as comptroller, to issue bonds and borrow the moneys called for ; that a demand had been made on respondent to comply with such calls, and that he had refused the same.

In the proceeding against the other officials of the city, a further affidavit recited the incumbents of the several offices, that the auditor had failed to audit the trustees' demand, the mayor to countersign the bonds, the clerk to attest the same, &c., and prayed that mandamus might issue against each of them respectively to discharge their respective duties towards a complete compliance with the statute by the payment to the trustees of the money called for.

Affidavits were submitted by the respondent, Kelly, in answer to the application, to the effect that the bridge upon completion would obstruct navigation ; and, in justification of failure to pay, that the original enterprise was instituted for improper purposes ; that William M. Tweed, on an examination before the common council, testified as to improper means on the part of the officers of the old bridge company to secure the subscription of the city of New York to the capital stock of said company, though the respondent did not allege such testimony to be true ; also, that the act

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of 1875 is unconstitutional as contravening section 11, article 8, of the amended constitution. Also, alleging that the relator, Mr. Murphy, admitted that the trustees were proceeding with the work without reference to the ultimate cost; and alleging that the trustees were so proceeding with the work in such an extravagant manner, that the bridge would be nearly if not fully one-third incompleated when the entire expenditure authorized by the act of 1875 had been made. That ample provision was made by the law of 1875 to complete the bridge within the limit of expenditure therein authorized, but that the trustees refused to bring their expenditures within such limit; and, finally, that the board of estimate and apportionment had not authorized the issue of any more bonds, and that the ordinance of the common council for the issue of the bridge bonds had been repealed by another ordinance annexed to the affidavit.

The several city officers, other than the mayor and comptroller, submitted affidavits, alleging that no demand had been made upon them to perform the acts required.

In reply there was submitted a further affidavit by the relator, denying expressly the assertions of William M. Tweed, and denying all charge of extravagance and waste; setting forth that the respondent, Kelly, is himself one of the trustees of the bridge, and that one-half the board are Mr. Kelly's appointees; that until the affidavit was made by Mr. Kelly, in answer to this application, he had never opposed or even criticised any action of the board, or of its proposed plans; that the only admission or statement of the relator was made in answer to an argument of counsel before the board of estimate, when the relator gave as his opinion that the limit named in the act of 1875 was a limit of appropriation, not of cost; that the trustees have endeavored strictly to comply with the appropriation,

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but that he and the trustees have deemed the paramount and controlling consideration, both to comply with the requirements of the secretary of war and for the benefit of the public, was the entire strength and safety of the structure; that at the present time the bridge is more than three-fourths built and more than three-fourths of the expenditure made, and that from a further calculation made in August last, it can be predicated with all reasonable certainty that the bridge will be finished and completed at an expense not \$200,000 in excess of the amount named in 1876, exclusive of \$350,000 expended in the change of Frankfort street by direction of chapter 165, *Laws of 1877*.

On the argument the counsel for the relator stated that their application was solely for a peremptory writ.

BARRETT, J., denied the application, assigning his reasons as follows:—It may be conceded that where power to construct a public work is expressly conferred, its exercise is not impliedly limited by the amount of the appropriation therefor. But was the legislative provision in question a mere appropriation, or was it a limitation upon the entire cost?

It is urged that where the latter is intended, express words of limitation are generally used. That may be quite true, and it may be a good reason why the implication should be clear and irresistible. But that is all. The legislative intent is not to be ignored because of the form of its expression. Now, looking at the act (*Laws of 1875*, c. 300), it seems quite plain that the general powers conferred are subject to the proviso that the bridge is to be fully completed at a cost to the two cities of not more than \$8,000,000. For a sum (within that limit) to be paid by them they are to have a structure "open to public travel, and with its debts and liabilities fully paid." The entire act, from its title to the last section, contemplates the completion

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of the work, and the third section fixes the maximum of expenditure. True, the language of the proviso is "that the whole amount to be paid by both cities should not exceed," &c.; but there is not the slightest suggestion of any other construction, voluntary or involuntary, than by the two cities; and as the bridge is to be their property, the intention is apparent that they and they alone shall pay for it. Indeed this was not disputed. The real contention was that the language above quoted, construed with reference to the general power to construct, was merely a limit upon the continuing right to draw from the cities without further legislative appropriation. This, however, completely ignores the context, viz., that "the city of New York shall not be called upon to pay a greater sum than \$1,000,000 in any one year, and the city of Brooklyn not more than \$2,000,000 in any one year, until the said bridge shall be fully completed and open for public travel, and the debts and liabilities incurred therefor shall be fully paid."

These annual contributions are of course a part of the totality of \$8,000,000. Is it not perfectly clear, therefore, that the proviso must be read as though the italicized words immediately followed the \$8,000,000 limitation? What directly precedes must be read in the light of what immediately follows, and it is really difficult, in the face of this explicit and unqualified language, to perceive the application of the general principles of construction, so fully stated and so laboriously fortified by authorities in the able and instructive brief submitted by the learned counsel for the relator.*

It was intimated that even if this be a correct reading of the proviso, a limitation upon the cost was not effected; that the legislature, while thus undoubtedly

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limiting the appropriation, simply intended to impress thereon the expression of a desire, enforced by no positive restriction, that the authorized sum should suffice.

The idea imputes to the law-making power the puerility of mere idle admonition. It is wholly without warrant in the comprehensive and forcible language employed; and if it be sound we can only say that no limitation upon the cost of a public work can be effected by implication. We must be permitted to add that the position of the trustees really borders upon nullification of the legislative will; for the relator claims that although the two cities cannot, under the existing law, be required to pay more than the \$8,000,000, yet they can be compelled to pay every dollar of it without the slightest hope of receiving in return a completed structure. Thus the legislature declares that the whole amount to be paid shall not, the trustees that it shall, exceed \$8,000,000. This is what it comes to. The cities are to pay the entire \$8,000,000 and receive an unfinished structure. What then? Why, necessarily then they must either lose substantially all that has been expended or go on and pay to complete just what the legislature has said they shall not, namely, in excess of the \$8,000,000.

Much has been said about the difficulty and inutility of estimating in advance the cost of so great and novel an enterprise. This is suggested as an argument against an intention to limit the cost. But where is the difficulty in fixing some limit, and why should any public work be authorized until the power that imposes the burden has counted the cost, so far, at least, as to be able to fix a fair maximum? In the present instance, however, there could have been no difficulty, for the reason that when the legislature acted, the experiment was not in its inception, plans and estimates having been made long before, and, in fact, nearly

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\$5,000,000 having already been expended upon the work. How natural and reasonable that a limit upon the entire cost should then be fixed! As to the wisdom of thus limiting municipal servants in the execution of public trusts there surely can be no doubt, and the court should favor a construction which tends to check improvidence and waste (See *McDonald v. Mayor*, 68 *N. Y.* 28). Let the official keep strictly within his statutory authority. If the work cannot be done with the means afforded, that is, within the prescribed limits, let it stop until the sovereign power can again be appealed to.

The present application is addressed to sound judicial discretion. The relator takes high ground, demanding either a peremptory mandamus or a denial of his motion. An alternative writ he emphatically declines to accept. Thus he concedes, for the purposes of this motion, all the material facts in the opposing affidavits, and insists that, notwithstanding, a peremptory writ is his absolute right. If our views are correct, this position is entirely untenable. Further, if we have even demonstrated the doubtfulness of his legal right, the writ of mandamus, upon well settled principles, should not be granted.

Without specially considering the charges of waste and extravagance or the other points presented in opposition, the motion must, for these reasons, be denied with \$10 costs.

The relator appealed to the court at general term, where the orders were reversed, the following opinion being rendered:

BY THE COURT.*—DAVIS, P. J.—[Pronouncing the opinion orally.]—There are only two important questions involved here. The first relates to the remedy;

* Present, NOAH DAVIS, P. J., BRADY and INGALLS, JJ.

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whether it should be by mandamus or by some other proceeding to enforce the alleged rights of the trustees ; and whether, if a mandamus be issued, it should be an alternative or peremptory writ. The peremptory writ is the proper legal process in all cases where there is a clear right connected with a clear legal duty, independent of extrinsic facts to be determined or passed upon by a court or jury. In this case we conceive that there is no reasonable doubt that the legal right exists, if the construction of the statute be such as we think it requires, and if the legal duty is created by the statute, and by the subsequent action of the common council, clothing the comptroller with the necessary power, and directing its execution by the issuing of the bonds provided by the statute.

By the ordinance of the common council, passed on May 8, 1876, the comptroller was authorized and directed to issue the bonds specially described and provided for in the statute and ordinance, to meet the calls permitted by the statute from time to time as they should be made. That ordinance supplemented the statute, and created a condition of things by which a clear legal duty was imposed upon the comptroller to bring a clear legal right, existing in the trustees and created by a statute, into full operative force. Subsequently the common council adopted a resolution, prefaced with a preamble, setting forth the grounds upon which the resolution was based ; but that resolution is neither a repeal nor a modification of the former ordinance. It does not purport to be either. It simply "*requests*" the comptroller not to take the action which the ordinance of May 8, 1876, provides for, until he has first taken the judgment of the court. This amounted to nothing more than a suggestive request, which the comptroller in the due course of his administrative functions might properly respect, but which, if disregarded, would subject him to no serious

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consequences. The court cannot, however, under the circumstances, do otherwise than say that the comptroller was justified by the resolution in taking the opinion of the court before acting under the ordinance, and his whole duty in that regard will have been fully discharged whenever the court shall have passed upon the questions now presented.

This brings us to consider the other and the principal question, which is simply whether or not the construction placed by the court below upon the statute is or is not a correct one.

In our judgment, the statute of 1875, having provided for the erection of the bridge, by section 3 proceeds to provide for the moneys requisite to carry out the general objects of the statute. It first imposes in very general terms the expense of constructing and maintaining the bridge, and acquiring the land necessary therefor, upon the two cities of Brooklyn and New York. It then proceeds to provide the mode in which the trustees are to obtain the money necessary to be expended, by directing that upon their request the mayor and comptroller of the respective cities shall pay over the moneys to be raised under the act. A sum is appropriated in gross, to wit, \$8,000,000, to be drawn upon under this act, as prescribed, in the proportions of two-thirds from the city of Brooklyn and one-third from the city of New York. This is the maximum sum which can be called for by the trustees from the respective cities, and it is limited, both as to the amounts, the proportions, and the times within which it can be drawn. The act provides that from the city of New York there shall not in any one year be called a sum in excess of \$1,000,000, and from the city of Brooklyn in any one year in excess of the sum of \$2,000,000. And it provides that the right to call shall terminate whenever the \$8,000,000 shall have been thus exhausted. But the statute also looks to another con-

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tingency, which is that the total cost and expenses of the bridge, and of the necessary structures connected with it, may not reach \$8,000,000. And so another limitation is imposed, as we think, upon the power of the trustees to call upon the cities, and that limitation is expressed in the concluding words of the sentence, which have been, as we think, misunderstood to be a restriction upon the total cost of the bridge under all circumstances. That provision is couched in the words "until the said bridge shall be fully completed and open for public travel, and the debts and liabilities incurred therefor shall be fully paid." The true significance of that provision, as we think, is this in effect: connected with the residue of the section, it provides for the calling by the trustees upon the several cities from time to time in the proportions named for such portions of the gross sum as may be required "until the said bridge shall be fully completed and open for public travel, and the debts and liabilities incurred therefor shall be fully paid." That is to say, the right to call upon the cities for the \$8,000,000 is to be determined when those events occur, to wit, when the bridge is completed and open for public travel and all debts and liabilities are paid. So that if the bridge shall be completed for a less sum, the right to call is at an end, though the whole appropriation be not exhausted.

If the bridge costs \$8,000,000, there can be no call beyond that sum, and whenever the bridge is completed and the debts, &c., are paid, if the drafts have not exhausted the \$8,000,000 indicted in the statute, the right to call terminates. This makes the statute, as we think, consistent with the objects in view, and free from all intent to provide that the cost of the bridge itself shall be limited under all circumstances to the sum of \$8,000,000. It leaves open entirely to the future consideration of the legislature whether or not

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it will, in the exercise of its absolute power over the whole subject, make such further appropriation as shall be necessary to complete the structure, and determine in what mode the appropriation shall be paid. It may exclude the city of New York from all further payments. It may impose it upon the State, or wholly upon the city of Brooklyn, or distribute it upon such localities, and in such amounts, and in such ways, as that depositary of the absolute power of legislation in this State shall in its discretion see fit.

That leaves the case free from any embarrassment. We think, therefore, that the legal right exists on the part of the trustees, and the legal duty on the part of the comptroller, and that a mandamus directing the comptroller, in pursuance of the statute and ordinance already alluded to, to issue the bonds and pay over the moneys as applied for, ought to have been granted.

The order below will be reversed, and an order entered in accordance with the decision now announced.

From the orders of the general term the defendants appealed to this court.

George F. Comstock and *William Henry Arnoux* (*William C. Whitney*, counsel to the corporation) for the appellants, defendants.—I. The act of May 14, 1875, on which these proceedings are founded, was enacted in direct violation of the constitutional amendment of January 1, 1875 [see head notes]. It is evident that the purpose of re-enacting the private law, of changing from a private to a public work, and of making a public district, was to avoid the constitutional amendment, then recently adopted. But while the decisions in *People v. Albertson*, 55 *N. Y.* 50; *People v. Shepard*, 36 *Id.* 285; *People v. Draper*, 15 *Id.* 532, defined the power of the legislature in constitutionally establishing

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districts of other areas than those already established, these decisions also defined the limit of legislative power. If, therefore, the court shall find that this district is colorable merely, then it is obnoxious to this last cited decision. If, on the other hand, it is a substantial, new, geographical district, essentially different and distinct from the city of New York, then the law is unconstitutional in creating a debt for the benefit of this new division, for it is providing for the incurring of an indebtedness which is not for city or county purposes. Further than that, the trustees of this new geographical division are made a corporation, with power to sue and be sued, and the moneys demanded by the trustees are borrowed by the city for the benefit of this new district, in which the city becomes, by the law, a joint owner with the city of Brooklyn, so that New York buys and pays for land outside of its corporate limits and beyond the purpose for which its citizens can be taxed. The provision to purchase the stock of the private stockholders, in section 1, is clearly in violation of the constitution. This law violates—1st. That provision of the constitution which forbids loaning money or credit to a corporation. 2d. That which forbids a city to become the owner of stock in a corporation. 3d. That which forbids the city of New York the incurring of indebtedness except for city purposes.

II. Whenever the relator declines an alternative mandamus, he puts himself upon a strict legal right, and stands before the court in the attitude of one who demurs to the answer, and by so doing admits the allegations in the answering affidavits to be true. For the purpose of this appeal, therefore, the court must take all the answering affidavits to be wholly unchallenged, and must pass upon the questions presented by this appeal under that concession. They make their motion for a peremptory writ of mandamus upon the

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moving and opposing affidavits. A motion so made is in the nature of a demurrer. It concedes the facts to be set forth in the opposing affidavits, and proceeds upon the plea that although true in each and every particular, they do not constitute a sufficient answer (People *ex rel.* Bently *v.* Commissioners of Highways, 6 *Wend.* 559; and 7 *Id.* 474; Commercial Bank of Albany *v.* Canal Commissioners, 10 *Id.* 31; People *ex rel.* Jennings *v.* Seymour, 6 *Cow.* 515, 579; *Exp. Rogers*, 7 *Id.* 526; Fish *v.* Weatherwax, 2 *Johns. Cas.* 2d Ed. note, 217-263, and cases cited). Disputed facts cannot be passed upon on this motion. It is only where there is no question as to the facts, or where the conceded facts constitute no answer, that this writ can be issued in the first instance. In *Exp. Rogers*, 7 *Cow.* 526, it was declared, that on an application for a mandamus, when both parties are heard, and there is no dispute as to the facts, and the law is with the application, a peremptory mandamus will be granted in the first instance. In Commercial Bank of Albany *v.* Canal Commissioners, 10 *Wend.* 31, the question was fully considered and the decision bears. The modern practice is not to award a mandamus in the first instance, but to grant an order to show cause why a mandamus should not issue. In such cases the question is discussed upon the original papers on which the order was obtained, and upon the opposing affidavits. If there is no dispute about the facts the court denies the application, or may award a peremptory writ in the first instance. If the facts on which the claim of the relator depends are in dispute, the court awards an alternative mandamus. In People *ex rel.* Cagger *v.* Supervisors of Schuylers (2 *Abb. Pr. N. S.* 78), the court, at general term, held that the "more modern practice is to give the ordinary notice of a motion based upon affidavits, that on the hearing a peremptory writ will be asked for. In that case, if it then appears that no

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material facts are in dispute, the court may grant or deny the peremptory writ at once, disposing of the question of law subject to a revision on appeal. But if it then appears that material facts are in dispute, and that the application has merits, the course is to grant an alternate writ, that issues may be joined and the disputed facts settled by a proper trial. In *People ex rel. Bagley v. Green*, 1 *Hun*, 4, it was decided: "Where the fact, upon which the right may depend, is controverted, it must first be tried and determined, before a peremptory mandamus can be issued, and that determination is to be made not upon conflicting affidavits, but upon an issue framed upon the return to the alternative writ, to be tried by a jury according to the course of the common law."

III. The limitation of the expenditure to the sum of \$8,000,000 is a limitation upon the power of the trustees to demand, or of the cities to grant, any sum that can exceed the amount specified, and likewise a limitation upon the cost of the bridge, so that whenever it shall appear that the bridge cannot be completed for public travel and all the bills paid by the expenditure stated, the power and duty of the trustees to ask for, or of the city to advance, any moneys for the further prosecution of the work is at an end, unless and until there should be further legislative enactment granting such power (*Amey v. Allegheny*, 24 *How. U. S.* 364). The language of the court of appeals in *McDonald v. Mayor* (68 *N. Y.* 23, 28), is peculiarly appropriate to this case. In that action plaintiff claimed to recover the value of certain materials delivered by him to the city at the request of the superintendent of roads of the city of New York, contrary to the charter; the plaintiff was defeated. "It is plain," say the court, FOLGER, J., "that if the restriction put upon municipalities by the legislature, for the purposes of reducing and limiting the incurring of debt and the expenditure of the public money,



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may be removed, upon the doctrine now contended for, there is no legislative remedy for the evils of municipal government, which of late have excited so much attention and painful foreboding. Restrictions and inhibition by statute are practically of no avail, if they can be brought to naught by the unauthorized action of every official of lowest degree, acquiesced in, or not repudiated, by his superiors" (Citing *DENIO, J., Peterson v. Mayor*, 17 *N. Y.* 449; *Peck v. Burr*, 10 *Id.* 294; and see *Wallace v. Mayor of San Jose*, 29 *Cal.* 180, 187; *Wyncoop v. Congregational Society*, 10 *Iowa*, 185). The same idea is thus expressed in *Parsons v. Goshen*, 11 *Pick.* 399: "This limitation upon the power and authority of towns to enters into contracts and stipulations is a wise and salutary provision of law, not only as it protects the rights and interests of the minority of the legal voters, but as it may not unfrequently prove beneficial to the interests of the majority, who may be hurried into rash and unprofitable speculations by some popular and delusive excitement, to the influence of which even wise and considerate men are sometimes liable." *Donovan v. Mayor*, 33 *N. Y.* 291, was a case of similar character. *PORTER, J.*, delivering the opinion of the court, says: "As there was neither an appropriation for the work nor a certificate of its necessity by the head of the department, and as it was unauthorized by the common council, the contract was made by the municipal authorities in direct violation of law. A contract thus made by public officers, acting in a purely fiduciary capacity, is a simple and absolute nullity. The city has no power to act except through its municipal officers, and when they assume, as its agents, to exercise authority in disregard of prohibitions applying alike to them and their principal, their action is wholly ineffectual, unless it be to subject them to personal liability for assuming powers with which the law has not clothed them." An act of

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congress of 1820 (3 *Stat. at L.* 568, and see 1 *U. S. R. S.* § 3732) provides that "no contract shall hereafter be made" by specified secretaries, including the secretary of the navy, "except under a law authorizing the making of the same, or under an appropriation adequate to its fulfillment." Under a law subordinate to that act, the secretary of the navy was "directed to cause to be constructed at each of the navy yards at Kittery, &c., &c., a floating dry dock, . . . and the sum of \$50,000 is hereby appropriated toward said dock at Kittery." It appeared that the choice was limited to two patented inventions, and the price demanded exceeded the appropriation. The attorney-general was asked whether the secretary was authorized to contract for the works at a price exceeding the appropriation. Mr. Attorney-General Clifford answered: "As the amount appropriated is confessedly inadequate to the fulfillment of the contracts, if any should be made, it is manifest that the authority does not exist. The prohibition is too explicit and comprehensive to be overcome by any rule of construction known to the law" (4 *Op. Att.-Gen.* 600). In another case, where, by the special provision for a particular work commenced and in progress, it was provided by congress that nothing in the act should be so construed as to authorize any officer of the government to bind the United States by contract beyond the amount of the existing appropriation, Mr. Attorney-General Cushing was of the opinion that the law did not empower the president to engage the government beyond the specific sum (6 *Op. Att.-Gen.* 26). Judge DILLON, in his able work on *Municipal Corporations* (2d Ed., § 381), in reference to legislative restrictions upon corporate powers, aptly says: "The opposite doctrine would be fraught with such danger, and accompanied with such abuse, that it would soon end in the ruin of municipalities, or be legislatively overthrown.

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. . . . The history of the workings of municipal bodies has demonstrated the salutary nature of this principle, and that it is the part of true wisdom to keep the corporate wings clipped down to the lawful standard." There is nothing inconsistent with the foregoing views of the court of appeals as expressed by Judge FOLGER, and those of Judge McLEAN in the Cincinnati Court-house case (*Cook v. Commissioners of Hamilton County*, 6 *McLean*, 112, 119), where \$200,000 had been appropriated: "There is no express limitation in this regard, nor can one be implied, unless it be that \$200,000 only were appropriated. In all public works, either by the Federal or State governments, it is not usual to appropriate, when the work will require several years for its completion, more than a small part of the necessary expenditure. Any other course, especially where the money must be borrowed, would be a wasteful expenditure. By the Act, the Commissioners were authorized to 'erect all such suitable and necessary public buildings for the said county, &c., of such materials and upon such plan, as to them shall seem proper.' From this provision it is clear that the buildings were to be constructed under the discretion of the Commissioners, which is inconsistent with the supposition that they were limited in their expenditure to \$200,000. Every practical man must see that the buildings required to be constructed would cost more than three times that sum. In the absence of any express limitation, so unreasonable an inference as would defeat the object of the law, cannot be made nor sustained." So, in the case of the Water Works of the city of Salem (14 *Allen*, 87), the court, after carefully examining the law authorizing the works, finds that, although the legislature did not impose any limitation upon the cost of the works, it did impose a limitation upon the amount of indebtedness that might be incurred on account thereof, and the intent of the legislature was not ex-

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pressed in anything like the explicit language used in this case. The following cases, recently cited in a note to the case of *Kingsley v. Brooklyn* (5 *Abb. N. C.* 1), as bearing upon this question, throw thereon but little light in *County of Jackson v. Hall* (53 *Ill.* 440), the county court having, under the law, full authority to build a jail, authorized one to be built, provided it should not cost exceeding \$10,000. The contractor built it at a cost of \$25,000. The court accepted the building and issued the bonds therefor. It was held that this was legal. The case in Pennsylvania adjudged that the approach to a bridge "is so necessary to its use, that without it the structure is a vain thing; utterly useless, and of no account. The bridge is incomplete until everything necessary for its proper use has been supplied, and every such necessary appliance is part of the bridge." The question was whether the township or the county was liable for grading the highway approaching the bridge. The court held in accordance with the above views, that it was a county charge (*Penn Township v. Perry Co.*, 78 *Penn. St.* 457). *Hasbrouck v. City of Milwaukee*, 13 *Wis.* 37, held, that where a city was authorized to expend a certain amount of money to construct a harbor, the law did not confer power to construct a harbor the expense of which should exceed that sum, and that as to such excess the contract was illegal, and that no legislative ratification of the excessive contract was binding without the assent of the city. The amount appropriated was paid the contractors, and they brought their action for the excess of cost, and judgment was rendered against them. In *Guidet v. Mayor* (36 *Superior Court Rep.* [4 *J. & S.*] 557), it was held, that to entitle a party to recover against the city, he must show a strict compliance with the law, and where the law required a certificate as a condition of payment, the failure to produce such certificate, or to account for its absence, was

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fatal to plaintiff's claim. In the case at bar, Judge BARRETT commends his decision by the thoughtful and conclusive argument of his opinion.* The only suggestion of any weight that can possibly be made against his view is, that in a great work of this kind it cannot be presumed that the cost can be accurately predetermined. Whatever force there may be in this argument, it can only apply to the construction of the act to be given by the court; for whether the cost can be predetermined or not, if the legislature has intended to limit such cost, and has so expressed that intention, that the courts can discern it, then the courts are in duty bound to give effect to the legislative will. But with the same logical force that Judge BARRETT demolished the argument against limitation on cost, he deals with this proposition.† This case is made all the stronger by the use of the word "provided," which is generally considered not to enlarge, but rather to restrain, the clause to which it refers (*Rice v. City of Keokuk*, 15 *Iowa*, 579, 583). "The office of a proviso, generally, is either to except something from the enacting clause, or to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of it, as extending to cases not intended by the legislature to be brought within its purview (*Minis v. U. S.*, 15 *Pet.* 445). The effect of a proviso is not to enlarge or extend the act or the section of which it is part, but rather to put a limitation and a restraint upon the language which the lawmaker has employed (In the matter of *Webb*, 24 *How. Pr.* 247). "Conditions and provisos . . . have for their object to limit the scope and defeat the purpose of the principal contract" (*Dilleber v. Home Life Ins. Co.*, 69 *N. Y.* 256). In an assessment case, involving the power of the city to impose an assessment, the court of appeals say: "It is a power given, with a

* Page 389, above.

† Page 391, above.

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proviso annexed. The demand of the proviso must be answered, as a prerequisite to the legitimate exercise of the power." "A proviso in a grant or enactment, is something taken back from the power first declared. The grant or enactment is to read, not as if the larger power was ever given, but as if no more was ever given than is contained within the terms or bonds of the proviso" (Matter of Second Ave. Church, 66 N. Y. 395). The authorities are unanimous upon this proposition, that whenever, by express language or by reasonable implication, the courts shall find that the legislature intended to restrain a municipal corporation in the expenditure of money, the courts will not sanction any acts which necessarily violate such restraint, especially where such restraint is imposed in the form of a proviso. And whenever it was discovered that the work authorized could not be completed, as directed, within the sum limited, it became the duty of the trustees themselves to refrain from any further expenditure of money; for there is no presumption, either of law or in fact, that the legislature would authorize any increased expenditure. In this case the trustees not only violated their duty, but, through the instrumentality of the courts, seek to compel the municipal authorities to violate theirs. The court can rebuke this lawlessness by affirming the order of the court below denying the peremptory mandamus, the application for which "really borders upon the nullification of the legislative will."

IV. The bridge as it is now being constructed violates both the law of the State of New York and of the United States. The provisions of the former against "the construction of any bridge which shall obstruct the free and common navigation of the East River," and of the latter, "that the said bridge shall be so constructed and built as not to obstruct, impair or injuriously modify the navigation of the river," protect the com-

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mon law right of the people in the navigation of the East River, an arm of the sea between Long Island Sound and the bay of New York, in which the tide ebbs and flows. The navigable waters of every civilized nation, including the sea within its jurisdiction, and all bays, estuaries, tidal-waters and rivers belong to the people at large, are public highways, and cannot be encroached upon or permanently appropriated to any private use of any individual or corporation, without the consent of the sovereign power.* In England, since Magna Charta, this right is superior to the king, and can only be restricted by parliament, and is universally superior to every other civil right with which it comes in conflict. There is also a *jus publicum* in every public seaport, by which all persons, except enemies, have the right to enter and depart with their goods, wares and merchandise without let or hindrance. In this country, a grant of power to regulate commerce is given to congress by the constitution, and this includes the power to regulate navigation and establish seaports. This power is exclusive. In consequence thereof, the States have no authority to obstruct any port or navigable tidal-waters which form connecting links with the sea or extend through other States. Subject to this right, the riparian sovereign alone can authorize the construction of a bridge wholly within its own territory, and can prescribe terms upon which it shall be so constructed. Hence it follows that, as the East River is wholly within the State of New York, and is a navigable arm of the sea, no restriction whatever can be put upon the public right of navigation and free use of said river without the concurrent consent of the State and of the nation. The permission of one without the consent of

* See also Northern Transportation Co. of Ohio v. City of Chicago, 98 U. S. (8 Otto); S. C., 7 Reporter, 385.

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the other is unavailing. The permission which has been given by the concurrent authority of the State and nation, protects the common law rights of the people. At common law, whatever, at any time, in any manner, or under any circumstances, obstructs, impairs, impedes, hinders, delays, or that adds anything to the expense of the free use of, or that in any other manner encroaches upon the *jus publicum* in or to any highway, marine, fluvial or terrestrial, of human agency, unless authorized by the sovereign power, is a nuisance, and as such may be abated by force, or by due process of law. A mathematical calculation will suffice to determine that a bridge is a nuisance (Wheeling Bridge Case, 13 How. U. S., 564). In this State, it has been held, that where a vessel being out of repair, receives damage from an obstruction which it would not have received if it had been in repair, the owner of such vessel can recover for the injury thus done. A telegraph company had authority to sink a cable across the Hudson River, which should not "injuriously interrupt the navigation of said waters." A loose iron, hanging below the keel of a vessel, caught in the cable, and so the vessel was injured. It was held that the company was liable (Blanchard *v.* Western Union Tel. Co., 60 N. Y. 510). In principle there can be no difference between a cable below the surface of the water that obstructs navigation, and a cable above the surface of the water that effects the same result. And if the owner cannot be compelled to repair his vessel to sail over one cable, he cannot be compelled to alter his vessel to sail under another. Nor is the question of expense an open one, for it has been held that any obstruction which would render navigation more expensive, would be unlawful (Avery *v.* Fox, 1 Abb. U. S. 246). A still stronger case is afforded in North Carolina. A railroad company, under authority by State law, built a bridge across the

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river Neuse, and a steamboat captain deliberately ran his steamer into, and tore away part of the bridge. For this he was indicted for a trespass. The court held that the bridge obstructing a navigable river was a nuisance, and, therefore, the accused was not guilty (*State v. Parrott*, 71 *N. C.* 311; 17 *Am. R.* 5; and see *State v. Dibble*, 4 *Jones L. [N. C.]* 107, 115; *Renwick v. Morris*, 3 *Hill*, 621). In this respect marine and terrestrial highways have a common footing. As far back as King Charles, it was held that the erecting of a gate, although it be not locked or tied, but that every subject may open it and have passage at his pleasure, is a nuisance; for it is not so free and easy a passage as if no such inclosure had been (*James v. Hayward*, *Cro. Car.* 184). So, where a footway had a stone stile two feet high across it, the defendant removed the stile and put up a five-bar gate with a step upon it, *PARKER*, Baron, held he had no right to put up a high five-bar gate to give the people the trouble of getting over it (*Bateman v. Burge*, 6 *Car. & P.* 391). Our courts have further held that trees or shrubs standing or growing in the highway that obstruct, hinder or annoy travelers, are nuisances (*Phifer v. Cox*, 21 *Ohio St.* 248; 8 *Am. R.* 58). The only difference between the terrestrial and the marine highway is this, that if they ever come in conflict, the water highway has superior rights. If the foregoing point is sound in law, as we believe it to be, then the defendants were bound to refuse to advance to the trustees of the bridge any more moneys, whether the bridge was to be built within the limit of the expenditure or otherwise. The grant of the moneys by the State of New York being predicated upon the condition precedent that the bridge shall not obstruct the free and common navigation of the East River, and it being admitted by relators in the form of the proceedings taken herein that the bridge is now, as a matter of fact, and will be, an

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obstruction to the free and common navigation of said river, the court should refuse, in the exercise of its sound discretion, to compel the application of moneys to the erection of an illegal structure. We urge this point upon the respectful consideration of the court with additional earnestness, for this further reason: This argument is now to be heard in the month of February, when no work of importance in the prosecution of the erection of the bridge can be undertaken, so that there is no delay in the work. At the same time, the legislature is in session at the capitol, and it can say whether it will consent to waive the condition it has imposed, that this bridge shall not obstruct the free and common navigation of the river, a question vitally important to the commercial supremacy of the city of New York, and one upon which the welfare of the whole State largely depends.

V. The authority given to the secretary of war, under the act of congress, was simply confined to the inception of the work; it neither did nor could confer upon him the judicial power of judging and determining that the bridge would not obstruct, impair or injuriously modify the navigation of the river; but if it did, it could not confer upon him the right to determine whether the State law was complied with. This authority is no greater than, it is not so great as, the authority conferred on the commissioner of patents. But the courts have always held that the issuing of a patent was only a *prima facie* right, and the courts have never thereby been ousted of their jurisdiction over that subject.

VI. Even under that authority the bridge is an unlawful structure. 1. The law says: "until the secretary of war approve the plan and the location of the said bridge, and notify said company of the same in writing, the bridge shall not be built or commenced." Now, there is no pretense that the secretary of war has

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ever notified the company in writing or otherwise of his approval. It is simply that General Humphreys says that he is directed by the secretary of war to inform them that he approves their plan. The familiar principle is that one who exercises a delegated authority has no power to delegate that authority. The law made the secretary agent to give written notice. The secretary had no authority to authorize General Humphreys to give such notice. Otherwise the series might be indefinitely continued. 2. But, conceding for the sake of argument that the authority has been validly exercised, nevertheless the bridge is an unlawful structure. The express requirement of the conditions is, that there shall be no violation of the fourth condition while the bridge is in course of construction, and the diagram opposite page 78 shows that the storm ropes, so called, violate it, and the affidavits show that such storm ropes have caused injury to vessels. Putting up these stays was a revocation of the permission to build. The court in construing a condition cannot inquire into the magnitude of its infringement. The maxim *de minimis* has no application to conditions.

VII. The courts should not sanction the application of the trustees for any more money because of the reckless and criminal extravagance of the trustees in their procedure, and the uselessness of the bridge when completed. 1. The evidence before the court clearly shows that the moneys paid by the cities to the trustees have been wasted. 2. The evidence before the court also shows that the bridge is not being constructed in conformity to that provision of the law that requires that the said bridge shall be constructed for the safe travel of the inhabitants of the cities of New York and Brooklyn. Another danger to be apprehended from the bridge is the overcrowding of foot-passengers. Of course the bridge, with a grade of two hundred feet to the mile, would be utterly useless for

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loaded vehicles. Carriages, light wagons and empty teams only could ever make any practical use of the bridge. In view of these facts, we hazard nothing in saying that the universal public sentiment in New York city is opposed to the bridge as injurious to navigation, prejudicial to the maritime interests of the port of New York, an unsafe and unnecessary structure, and useless for all practical purposes of locomotion. And furthermore, if the same, under its present plan, could be built from its foundation for \$4,000,000, the people would refuse to sanction such expenditure, deeming it to be dear at that price. It will be borne in mind that under the form of the proceeding herein, the relator has, in legal effect, demurred to the answer the defendants have made, and thereby admitted all the allegations of fact in the answer to be true, as has heretofore been shown. Under these conceded facts, it is admitted that the bridge, when completed, will not be safe for the travel of the inhabitants of the cities; and upon this fact the court must act, for the law puts the construction of the bridge upon the two cities, and appoints the trustees "for the purpose of managing and constructing said bridge," giving them "full power, control and direction over the plan and construction of said bridge." It is, therefore, the plain legal duty of the trustees to construct this bridge for the safe travel of the inhabitants, and whenever a public board violate a duty imposed by law, the courts have power to restrain them; *a fortiori*, when they come seeking the interposition of the court in their behalf as a matter of favor, the courts will refuse to aid them. 3. Over this matter the courts have control. The plans and specifications were, by law, placed in the control of the trustees, but the safety of the structure never was. The courts have this matter in their jurisdiction, and if they find that the plans adopted by the trustees will result in an unsafe struct-

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ure, the courts can restrain the further expenditure of money, that may not only be wasted, but that may involve in some grave catastrophe the lives of many citizens. In this case the courts can exercise their restraining power by refusing to grant the order demanded by the relator.

*William M. Evarts, A. J. Vanderpoel, Austin Abbott, and Edgar M. Cullen (Cullen & Bergen, attorneys), for the relator, respondent:—*I. The question which arises on the construction of section 3, chapter 300, *Laws of 1875*, is, whether the limit of \$8,000,000 is a limit on the amount of municipal appropriation, or whether it is a limit on the entire cost of the whole work as a completed structure, and imposed in such a form as that the appropriation, even within the limit, is not available, if it appears that in performing the duty imposed upon the trustees to construct the bridge according to the plan prescribed by the legislature, the complete execution of the plan will cost more than \$8,000,000? In other words, is the duty of the trustees to construct the bridge, and their right to any of the moneys provided by the act of 1875, dependent on the condition that it be made to appear that notwithstanding all fluctuations in the value of labor and materials, all delays from accidental causes, all possibilities of interest accumulating before money is furnished by the cities to make payments, the bridge will be completed within the limit of \$8,000,000? The claim of the relator is that the duty is imposed on the trustees to construct the bridge—that “full power, control and direction over the plan and construction of said bridge” is given to them (subject to the act of congress and action under it of the secretary of war), and that the limit of money prescribed by the act was a limit on the amount of the contributions to be made by the two cities. That the trustees are entitled to such contributions up to the sum so limited; that the subject of

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further appropriations, if found necessary and expedient, was a matter for future legislative action, and the question of the necessary cost of the bridge cannot be determined by the courts or by any other tribunal than by the trustees themselves. That when the bridge is completed, and all debts fully paid, the right to draw money ceases, even though the whole \$8,000,000 has not been expended. 1. The act of 1875, the construction of which is in dispute, provides, in section 1, for retiring the private stock of the old bridge company, the dissolution of such company, and that "the debts and liabilities of the same shall be paid by the trustees hereinafter mentioned," and the bridge now in course of construction over the East river, between the cities of New York and Brooklyn, shall be completed and managed as hereinafter provided for on behalf of the cities of New York and Brooklyn. Section 2 makes provision for the appointment of the board of trustees to manage the bridge, and that such board "shall have full power, control and direction over the plan and construction of the bridge." Section 3 provides that the expense of constructing the bridge, and of all liabilities incurred under the act shall be defrayed by the two cities in the proportion of one-third by the city of New York and two-thirds by the city of Brooklyn; that for such purposes the trustees shall call on the cities for such sums as they deem proper in the proportions above mentioned, "provided however, that the whole amount to be paid by both cities shall not exceed \$8,000,000; and the city of New York shall not be called on to pay a greater sum than \$1,000,000 in any one year, and the city of Brooklyn not more than \$2,000,000 in any one year, until the said bridge shall be fully completed and opened for public travel, and the debts and liabilities incurred therefor shall be fully paid." 2. The question of construction at issue here may most conveniently be shown by

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inserting in italics what serves to make clear the meaning contended for on each side :

The Relator's Construction.

§ 8 . . . the expense of constructing and maintaining the same, and acquiring the land necessary therefor, and all liabilities imposed upon them, or incurred by them, by virtue of this act, shall be defrayed by the said cities in the proportion of two-third parts by the city of Brooklyn, and one-third part by the city of New York, and for such purpose the said trustees shall, from time to time, as they shall deem necessary, call upon the said cities, by request made to the mayor and comptroller thereof respectively, for such sums as they shall deem proper in the proportions above mentioned (provided, however, that the whole amount to be paid by both cities shall not exceed \$8,000,000, and the city of New York shall not be called upon to pay a greater sum than \$1,000,000, in any one year, and the city of Brooklyn not more than \$2,000,000 in any one year) until the said bridge shall be fully completed and open for public travel, and the debts and liabilities incurred therefor shall be fully paid, and the said cities of New York and Brooklyn are hereby authorized and required, from time to time, to issue bonds," &c.

The Defendant's Construction.

§ 8 . . . the expense of constructing and maintaining the same, and acquiring the land necessary therefor, and all liabilities imposed upon them, or incurred by them, by virtue of this act, shall be defrayed by the said cities in the proportion of two-third parts by the city of Brooklyn, and one-third part by the city of New York, and for such purpose the said trustees shall, from time to time, as they shall deem necessary, call upon the said cities, by request made to the mayor and comptroller thereof respectively, for such sums as they shall deem proper in the proportions above mentioned, provided, however, that the whole amount to be paid by both cities, *cost of the entire work*, shall not exceed \$8,000,000, and the city of New York shall not be called upon to pay a greater sum than \$1,000,000 in any one year, and the city of Brooklyn not more than \$2,000,000 in any one year, *nor shall they be called upon to pay said \$8,000,000, unless by such payment* the said bridge shall be fully completed and open for public travel, and the debts and liabilities incurred therefor shall be fully paid, and the said cities of New York and Brooklyn are hereby authorized and required, from time to time, to issue bonds," &c.

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3. It will be seen that the act does not declare or fix the amount of the debts and liabilities of the former corporation which were to be paid by the trustees. This was all uncertain, and it nowhere provides for an estimate or ascertainment in advance of the cost of completing the bridge, either by the trustees or any other officers or tribunal, nor for the adoption in advance of the details of a plan whose estimated cost would be within the limit of \$8,000,000. Therefore, if the limit of the cost of such completion within said sum is a limit on the powers of the trustees to draw any moneys whatever, such limit is not the probable or apparent cost, but the actual cost of the structure, as determined at its completion by the amount of expenditure then made. There is no middle ground on which to stand; either the trustees have the right to draw the moneys provided up to the limit named, or if the bridge should not be "fully completed and open for public travel, and the debts and liabilities therefor fully paid," every dollar paid to the trustees, or by the trustees, was illegally paid; every contract entered into by the trustees, even at the earliest stage of the work, was void, and gave no right to compensation for materials furnished or labor performed; and every dollar so expended could be reclaimed from the comptroller who paid, the trustees who expended, and the laborers and material-men who received the moneys, for all persons are bound to know the limits of the authorities granted to public officials. The right of the trustees to lay the foundation-stone would, upon the contention of the respondent, be made to depend on the fate of the cornice of the superstructure to be laid by their successors in office. In other words, the construction of the statute contended for by the appellant, and enunciated at the special term, makes that a precedent condition which, by the laws of nature and of supply and demand in trade, can only be a subsequent

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contingency. 4. The structure provided for, both from its magnitude and its exceptional character, was incapable of being made the subject of a contract. Of this the legislature were aware, and the act itself provides, not for the payment in a single sum for a completed work, but for daily and constant expenditures by the trustees during the progress of the work, not exceeding \$3,000,000 a year. The same board of trustees was not continued for the whole work, but new appointments are to be made every two years. The first board of trustees might not be able to so far complete the work with the limited sum, but that the succeeding board, by slight changes made in good faith, might exceed, by a few dollars, the expenditure, when the action of the first board would become illegal. Such a construction is at war with the paramount idea of the law, which was to complete a particular structure then unfinished. The act must be construed reasonably toward that end. Who, under the construction contended for by respondent's counsel, would serve as trustees? Who would contract with the trustees to furnish labor and materials if the validity of the contracts depends on the misfortune or waste of subsequent officials or subsequent mishap to the structure itself? 5. If it be urged that the validity of the trustees' acts, and their right to obtain funds must be determined, not by subsequent results, but by present and apparent indications, a doctrine for which we claim there is no authority in the act, we answer that such determination must be exercised once for all, and that at the inception of the work; otherwise, when work is prosecuting on the towers, the price of the iron superstructure rises, and the bridge cannot be finished within the limit; does the prosecution of the work then become illegal? Is it again valid on the decline of prices? What are the rights of a contractor furnishing stone at a time when, apparently, the work could be completed within

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the appropriation? Would it be a fair answer to him that iron had advanced in price to an extent not anticipated, and the bridge, therefore, could not be completed within the limit, and therefore his contract became void? 6. The determination of the cost of the bridge was devolved on the trustees, and cannot be examined by any other tribunal. The trustees were given full power and control over the plan and construction of the bridge subordinate to that approved by the secretary of war. A power in any body to review the determination of the trustees as to the cost of the bridge would necessarily carry power to review and control the plan and construction of the bridge, vested by the acts solely in the trustees. 7. The principles here contended for nowise contravene the doctrine of the limitation of the power of public officers; all such limitations are made dependent on facts existing at the time of the execution of the power, or acts to be performed prior to such time, and in no case upon future contingencies.

II. To maintain the objections made to the payment of the requisitions which have been made by the trustees, it must appear clearly from the statute not only that \$8,000,000 was expressed as the limit of the power of the trustees to contract, but also that the adoption of a plan which it should be practicable under all contingencies to fully complete within that limit, was made a condition to their power to draw up to that limit, or any sum on account thereof. 1. Statutes for the construction or execution of public works are usually either (a) Those which in effect authorize raising a certain sum and create a board of officers to expend that sum, or so much as may be needed in the performance of the work; and (b) Those which in effect create a board of officers with the power and duty to construct the work, with or without making at the same time an appropriation for the work. The first method the

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legislature have invariably or almost invariably adopted where the work is of such nature that whatever is done will be valuable as far as it goes, as in the case of improving the navigation of a stream, or building a highway. In the second class of cases, that is, where the duty to construct the work is imposed with or without providing an appropriation—the power is not necessarily dependent on the existence of an appropriation, nor limited by the amount of an appropriation. This is the method which the legislature have adopted where the substantial completion of an entire work is essential to the utility of any part of it; as in case of a bridge, a court-house, a capitol or State-house. 2. An examination of statutes of this class, in this State and elsewhere, will show that where the legislature wish to impose in advance “a hard and fast line” as to the entire cost of the structure, it is done in one or two ways; either (a) By a provision or condition that the entire cost or expense of the work shall not exceed a specified sum; or (b) By vesting the determination of the plan, or the estimates, in a different body from that which is authorized to make the contracts, and requiring it to be fixed as a condition precedent, or otherwise empowering the latter body to contract only up to the estimates. The former method has been most common in statutes providing for ordinary county bridges, especially where the statute authorized but did not require the work to be done. The latter method has been usual in the case of larger and more expensive structures, which were still, however, of a nature within ordinary experience and capable of approximate estimate. If the nature of the work is such that it is impracticable or undesirable to fix a maximum sum in the outset, it is usual to confer the power and create the duty, and then from time to time to make provision by appropriation, either directly or by issue of bonds or otherwise, to meet expenses incurred,

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whether before or after the appropriation in the exercise of the power. When this method is pursued the exhaustion of the appropriation does not terminate the officer's power, though it may suspend his duty and relieve him from liability for non-feasance meanwhile. If the statute creating the power and duty makes no appropriation, the omission does not vitiate the power, but contracts made under the power are valid. Hence the origin of the recent statutes expressly forbidding various particular municipalities or officers to make contracts in excess of appropriations. 3. This distinction does not rest upon a mere question of construction. It inheres in the nature of official power conferred by law, the fundamental principles of which are, that while officers cannot bind the government they represent beyond the limit marked by the power conferred, the power itself implies authority to do whatever is necessary and proper within that limit, to carry it into execution. 4. These principles and the inferences above deduced from them are amply supported by the authorities, of which a brief summary follows: (a) Power to construct implies the power to contract therefor on credit (*Ketchum v. City of Buffalo*, 14 *N. Y.* 356, *aff'd* 21 *Barb.* 294; *Meech v. Same*, 29 *N. Y.* 212). (b) And the rule is the same where the power is vested in a special committee or board of officers (*Damon v. Granby*, 2 *Pick.* 352). BY THE COURT, PARKER, Ch. J.—“To superintend the building of the house, includes the power to make the necessary contracts, since it does not appear that any other committee or agent was intrusted with this power, and since the making of contracts is essential to the building of the house.” Hence, a committee chosen by a town to rebuild a bridge have implied power to bind the town by contract to build on the credit of the town, although express authority to borrow money for the purpose was given them (*Simonds v. Heard*, 23 *Pick.* 120, Opinion by

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SHAW, Ch. J. S. P., Foote *v.* City of Salem, 14 *Allen*, 87—below stated). It is only when the law expressly prohibits the incurring of a debt that power to construct ceases to imply power to incur the necessary credit. See Donovan *v.* Mayor, &c. of New York (33 *N. Y.* 293 where it was held that under express statutes forbidding a contract where there is no appropriation, a contract made in the absence of appropriation is void. But a new legislative authority to construct without any such express restriction takes the particular work out of the general rule and implies the power to contract irrespective of the general restrictions (See People *ex rel.* Navano *v.* Van Nort, 64 *Barb.* 205; Greene *v.* Mayor, &c., of New York, 60 *N. Y.* 303, rev'g 1 *Hun*, 24). (c) The settled official construction of the federal legislation as to the power of the heads of departments is in accord with this principle. The act of congress (of 1820, § 6, 3 *Stat. at L.* 568, see 1 *R. S. U. S.* § 3,732) provided that "no contract shall hereafter be made" by specified secretaries, "except under a law authorizing the making of the same, or under an appropriation adequate to its fulfillment." Under this act a law giving power "to cause to be constructed" dry docks, &c., is not enough; it should give express power to contract or make adequate appropriation. But if the law gives express power to contract, the fact that there is no appropriation, or that the appropriation is inadequate, does not affect or limit the power (Nathan Clifford, Atty.-Gen., 1847, 4 *Op. Att.-Gen.* 600; Caleb Cushing, 1863, 6 *Id.* 26, 28). The distinction is again stated by Attorney-General Black, in construing the above act in 9 *Id.* 19, in these words: "If congress empowers the secretary of war to contract for cleaning out the obstructions from a certain river, the secretary may make a contract at once for the whole work; and even though no appropriation has yet been made to meet it, the

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faith of the government will be pledged to make it good. But if congress has merely appropriated a certain sum to be expended by the secretary of war for the improvement of a river, he exceeds his authority when he contracts for more work than the appropriation will pay." 5. It follows that if a statute creating a power and duty to construct a public work provides an appropriation in a sum named, the sum does not by implication define or limit the power. If \$200,000 are appropriated for buildings which must cost three times that sum, this is no limitation as to expenditure. No limitation is to be inferred which will defeat the object of the law (1854, Opinion by McLEAN, J., *Cook v. Commrs. of Hamilton*, 6 *McLean*, 112-119). In that case contractors sued the Cincinnati Court-House Commissioners for work done under their contract. One of the defenses relied on by the commissioners was that only \$200,000 had been appropriated and that the plans exceeded three times that amount, and that the object of the contract sued on was to evade the restrictions of the act. *Held*, that there being no express limitation on the power to contract, none could be inferred, from the fact that only \$200,000 were appropriated. The court says, page 119: "In all public works, either by the federal or state governments, it is not usual to appropriate when the work will require several years for its completion more than a small part of the necessary expenditure. Any other course, especially when the money must be borrowed, would be a wasteful expenditure. By the act, the commissioners were authorized to 'erect all such suitable and necessary public buildings for the said county, &c., of such materials and upon such plan, as to them shall seem proper.' From this provision it is clear that the buildings were to be constructed under the discretion of the commissioners, which is inconsistent with the supposition that they were to be limited in their expenditure

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to \$200,000. Every practical man must see that the buildings required to be constructed would cost more than three times that sum. In the absence of any express limitation, so unreasonable an inference as would defeat the object of the law, cannot be made nor sustained." In the case of the U. S. Marine Hospital in New Orleans ("The Trenton Company's Case," 12 *Ct. of Cl.* 147, 163), NORT, J., says: "If a public work were to be undertaken requiring twenty years of time, and involving \$20,000,000 of expenditure, it would be an absurdity to require congress to appropriate \$20,000,000 at the outset; and it would be equally a mischief if, congress appropriating only \$1,000,000 toward the work, an executive department should be compelled thereby to make all its contracts as though \$1,000,000 would be all that would ever be appropriated. From the first it has been the policy of the government to appropriate for public works no more money than may be required for the current fiscal year; and the validity of contracts has been deemed to depend upon the authority of the executive officers to contract, which in some cases might be implied from appropriations, and in others might be entirely independent of them. Appropriations are properly the means for satisfying indebtedness, existent or prospective; but the means for satisfying a debt are not a necessary condition to an authority to contract one." 6. The distinction between the limit of cost of entire plan and the limit of present power to expend, is further illustrated in the case of the State capitol in Sacramento. Under the constitution of California, which forbade the creation of a debt or liability on the part of the State exceeding \$300,000, a statute was passed (March 29, 1860) creating a board of commissioners to construct a State capitol. The act provided that the entire cost of the capitol should not exceed \$500,000; but only authorized the commissioners to contract to the extent of \$100,000. *Held*, that they might adopt a

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plan which would require in its execution the \$500,000 designated ; but as they could only contract to the extent of \$100,000, and further legislation must be had before any greater liability could be created, the statute was not unconstitutional, for it did not create a liability exceeding \$300,000 (1860, Opinion by FIELD, J., *Koppikus v. Commissioners*, 16 *Cal.* 248). 7. Even a prohibition or taxation for the purpose beyond a certain limit does not limit the power to contract. If there is no express or specific limit in the statutes as to the amount of liability which a municipality may incur for the purpose of constructing a bridge, provisions of the revenue law forbidding greater tax to be assessed than at a specified rate for bridge purposes, do not impose a limit. The power to incur liability in respect to bridges is distinct from the power to levy taxes to meet liabilities thus incurred. Limitations in revenue laws as to the amount of tax do not measure the legal power to make contracts for the purpose (*Kinsey v. Pulaski County*, 2 *Dill.* 253, Opinion by DILLON, J., 1873). 8. And where, in order to limit the expense, the statute contains a provision requiring a previous estimate, and limiting the power of contracting by the amount of the estimate, the restriction is not to be so strictly construed as to defeat the work. Thus, in a Rochester case, where the charter of the city provided that "no contract shall be let for making any public improvement at a price greater than the estimate thereof," *Held*, that this meant simply that in contracting for making a public improvement, the work included in the estimate shall not be let at a higher price than that specified in the estimate. It does not prohibit the common council from causing other work to be done in addition to that included in the estimate, if they find it necessary in order to complete the improvement (1868, Opinion by J. C. SMITH, J., JOHNSON and E. D.

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SMITH, J.J. Ireland *v.* Rochester, 51 *Barb.* 414, 427). 9. These principles are peculiarly important in the case of a work like that of the bridge in question, which not only is of great magnitude and requires a great length of time, but must meet difficulties and obstacles, both in the nature of the soil and the nature of the structure, and the mechanical problems involved, which could not be measured nor fully foreseen in advance. The cost of such a work depends upon conditions which are disclosed only by its performance. To fix by anticipation a limit of aggregate cost as a condition of the power of the trustees to go on with the work and expend the means put at their disposal by the statute, would require putting it at the highest figure which any contingency could possibly render necessary, and thus invite extravagance, or would render the trustees' contracts and payments, from the beginning, void, if in any contingency the limit proved inadequate to entire completion. 10. In the cases which have arisen respecting the construction of great public works these principles have been applied. In the Salem Water Works case (Foote *v.* City of Salem, 14 *Allen*, 87), the act, *L.* 1864, c. 268, authorized the city to construct certain works, and provided for the appointment of commissioners to execute them, and then by further provisions declared as follows: "For the purpose of defraying the cost of such franchises, property," &c., "as are taken," &c., "and of constructing the works necessary and proper for the accomplishment of said purposes, and paying all expenses incident thereto, the city council shall have authority to issue scrip," &c., "to an amount not exceeding in the whole, the sum of \$500,000." *Held*, that this imposed no limitation of the cost, and that the city had implied power to expend sufficient to complete the work in a reasonable and proper manner. BIGELOW, Ch. J., in delivering the opinion of the court, said: "In the ab-

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sence of any clear and explicit limitation, either express or implied, on the right of the city to expend money in the construction of works necessary to procure an adequate supply of water for the inhabitants, it must be held that the legislature intended to authorize an expenditure sufficient in amount to carry into effect the power granted in a reasonable and proper manner. This conclusion is the necessary result of the rule of interpretation, that the grant of a general power or authority carries with it the right to do everything that is necessary or fairly incidental to the due execution of the trust delegated." And he adds: "If construed as an absolute limitation on the authority of the city, no steps could be safely taken to execute the authority conferred, unless it had been previously ascertained that the expenditure to be incurred would not exceed the prescribed sum. But it is obvious that this would be clearly impracticable in relation to an enterprise of the character contemplated by the statute." In the case of the capitol extension at Washington, congress passed an act (September 30, 1850), appropriating \$100,000 "for the extension of the capitol, according to such plan as may be approved by the President of the United States, to be expended under his direction by such architect as he may appoint to execute the same." Under this, the power of the president to make a contract which would involve an expenditure exceeding the amount of the appropriation was sustained by the attorney-general, Caleb Cushing. He says (6 *Op. Att.-Gen.* 26), "An appropriation of money by congress, for a specific object, is an implied authority for the president to do the thing, provided it can be done, within the limits of the appropriation; for the mere fact of one appropriation does not necessarily involve the undertaking of congress to make further appropriation, and of course does not of itself empower the president to engage the

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government beyond the specific sum. But when the constitution of the United States, or any act of congress, authorizes and requires the president to do a thing, which involves the expenditure of public money, then, and in such case, the legality of an engagement of the president to have the thing done, that is, of a contract for its performance, is wholly independent of the question whether there is, or is not, an adequate appropriation by congress for the object." And he adds that this position is one of the very elements of the business of government. In that case congress, subsequent to the above-mentioned appropriation of \$100,000, appropriated \$500,000, with a clause, "provided that nothing herein contained shall be so construed as to authorize any officer or agent of the United States to bind the United States, by contract, beyond the amount appropriated by congress, or to sanction any such contract heretofore made." This, Mr. Cushing advised, was not a limitation of the entire cost of the work or plan. "The effect of this proviso," he says, "is, to reserve to congress the faculty of making, or refusing to make, further appropriations," and to prevent the contractors from making any claim on the government in excess of appropriations actually made. 6. Even if the limit of the sum to be paid by New York, &c., was a limit of entire cost, it must be presumed that the power to ascertain and determine whether the plan could be completed within that limit, was intended to be vested in the trustees, and must in the nature of things be exercised, once for all, in the adoption of the plan, or if the city of New York had any voice in the matter then, it was spent in the resolution authorizing the issue of the bonds. Thus, where commissioners were appointed by the legislature and directed to ascertain and certify when the bridge was completed, and the county commissioners were required, upon such proof of the completion, to pay therefor, *Held,*

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that the bridge commissioners' certificate was conclusive in the absence of fraud or mistake (*Guilder v. Dayton*, 22 *Minn.* 366). So, under a statute providing that county bonds should not be issued until a sufficient sum had been provided by stock subscriptions or otherwise, to complete a certain railroad, and imposing upon them the duty of delivering the bonds when such provision had been made without indicating any person or tribunal to determine that fact, necessarily delegates that power to the commissioners, and if delivered improvidently the bonds will not be invalidated (*Commissioners v. Nichols*, 14 *Ohio St.* 260, followed in *Town of Coloma v. Eaves*, 92 *U. S.* [2 *Otto*] 484. S. P., *Schanck v. Mayor, &c. of New York*, 69 *N. Y.* 444). And if the sum named is a limit of entire cost, the contracts and obligations incurred in good faith would only be voidable as to the excess. The fact that a part of the indebtedness contracted by a municipal corporation for a certain purpose exceeds the constitutional limit, does not render illegal that portion which is not an excess. The indebtedness will be valid to the extent to which the corporation is allowed to contract (*McPherson v. Foster*, 43 *Iowa*, 48, 72, 1876, Opinion by BECK, J.). In this case the constitution forbade any municipal corporation to become indebted in any manner, or for any purpose, to an amount in the aggregate exceeding five per cent., on taxable property, &c. A school district whose property and indebtedness was such that the provision only allowed them to incur about \$2,057.57 more debt, made a contract for the building of a school-house for \$15,000, which they paid in bonds, issued to the contractors, who negotiated them. The plaintiffs, as taxpayers, &c., sued to have the bonds declared illegal and void. *Held*, that they were void in respect to the excess, but valid to the extent of the debt which could lawfully be incurred. 7. There is nothing in the title of the act to modify these conclusions. (a)

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It is well settled that the title of an act, while it may be referred to, where the language of the act itself is doubtful, and especially may be referred to for the purpose of sustaining the act, cannot be used to restrain or extend any provisions in the body of the act (*Hadden v. Collector*, 5 *Wall.* 107). Where the meaning of the language is plain, the courts cannot qualify it on supposed ground of public policy (*Hyatt v. Taylor*, 42 *N. Y.* 259). (b) But if the title be referred to, it does not manifest any intention to make completion within the appropriation a condition. Even an express appropriation for the completion of a structure may be used, so far as it will go, although not sufficient to complete the work (*People ex rel. Cornell v. Norton*, 12 *Abb. Pr. N. S.* 47; *N. Y. Court House case*, 1871, Opinion by SUTHERLAND, J. See also *Foote v. City of Salem*, above cited).

III. There is nothing in the statutes prior to 1875, relating to the bridge, manifesting an intent that the language of section 3 should be construed as imposing a limit on the plan or entire cost, effective as a condition precedent to the validity of incurring expense within that limit. 1. By chapter 399 of 1867, a corporation was formed with power to build this bridge. The right was reserved to the cities of New York and Brooklyn to buy the bridge or to subscribe to its stock. No limit on the cost of the bridge was prescribed. The amount of capital which was fixed at \$5,000,000, did not raise any such limit (*Barry v. Mer. Ex. Co.*, 1 *Sandf. Ch.* 280, 298-312, 1844, Opinion by A. V. SANDFORD). 2. The cities having taken stock in the corporation, chapter 26 of 1869 was passed, giving each city a representation in the board of directors and making it the duty of said company to proceed without delay to construct said bridge. No limit on its cost was prescribed by this act. There was a limit of time, to wit: June 1, 1874 (§ 2). 3. Chapter 601 of 1874

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authorized the directors to purchase the right of private stockholders, and thereafter and after the acceptance of the act the two cities should appoint all the directors (certain officers of the cities being directors *ex-officio*) and the bridge was declared a public highway. For the purpose of completing the bridge, the two cities were authorized to issue bonds for specified amounts. No limit on the cost of the bridge was prescribed by this act. The act having been accepted, the entire board was constituted by the two cities. 4. The legal effect of these acts was that the work, commenced as a private enterprise, became a municipal work (*People v. Supervisors of Dutchess*, 1 *Hill*, 50), and the directors were agents and trustees for the two cities, not for the State (*People v. Ingersoll*, 58 *N. Y.* 1, 30; *Chicago v. McGraw*, 75 *Ill.* 566), and the rules of law by which municipalities are held liable for the acts and defaults of their agents in a voluntary work, and for possible defects in the methods or in the structure, became applicable against the cities (See *Barnes v. The District of Columbia*, 91 *U. S.* [1 *Otto*] 540, 551, and cases cited). 5. The subject of the burdens of municipal indebtedness generally attracted much attention at this time; and the legislature of 1873 and 1874 matured, and after the intervening popular election adopted, constitutional amendments to restrain the creation of such indebtedness. In framing these amendments, they reserved to themselves the power to provide for the completion of this work, it being exceptional in its magnitude and novelty, and in the degree of public necessity demanding it.

IV. The provision reading "the debts and liabilities incurred therefor shall be fully paid," was intended to negative the idea which might be drawn from the preceding words, to wit, that the right to draw money should only exist until the bridge should be fully completed and open for public travel—with an unexpended

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balance ; debts and liabilities might still remain unpaid, which, according to the letter of the clause as to the bridge being fully complete and open to travel, could not thereafter be paid by the trustees.

V. The act of 1875 is not obnoxious to the amendment to the constitution adopted in 1874. The amendments touching the subject are as follows : article III. section 18. "The legislature shall not pass a private or local bill in any of the following cases providing for building bridges, and chartering companies for such purposes, except on the Hudson river below Waterford, and on the East river, or over the waters forming a part of the boundaries of the State" (*L.* 1874, pp. 927, 928 ; Same provision, 1 *R. S.* 6th ed. 88). 1. Article VIII., section 10, first sentence: "Neither the credit nor the money of the state shall be given or loaned to or in aid of any association, or private undertaking" (*L.* 1874, p. 933 ; Same provision, 1 *R. S.* 6th ed. 102). Section 11, first sentence: "No county, city, town or village shall hereafter give any money or property, or loan its money or credit, to or in aid of any individual, association or corporation, or become, directly or indirectly, the owner of stock in or bonds of any association or corporation, nor shall any such county, city, town or village be allowed to incur any indebtedness, except for county, city, town or village purposes" (*L.* 1874, p. 933 ; Same provision, 1 *R. S.* 6th ed., 102). The former provision of section 1 of article VIII., that "corporations shall not be created by special act except for municipal purposes, and in cases where in the judgment of the Legislature the objects of the corporation cannot be attained under general laws," was left unchanged. 2. No restriction was placed upon the power of the State to impose upon municipalities the burden and duty of constructing and paying for a public work for their municipal purposes, nor upon the power of the State

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to appropriate moneys from the State treasury in aid of a municipal public work, as had been done in several cases of bridges—as in the case of the bridge over the Hudson at the mouth of the Scroon river in Warren county (1 *L.* 1871, p. 525, c. 268); that over the Hudson at the mouth of North creek (2 *L.* 1870, p. 1452, c. 625); the bridge over French creek (1 *Id.* p. 1112, c. 492); that over Great Sodus bay, in Wayne county (2 *L.* 1871, p. 1695, c. 735); and that over Cayuga inlet in Ithaca (*L.* 1873, p. 949, c. 624); and that over Cattaraugus creek, at Upper Irving (2 *L.* 1868, p. 1614, c. 717). 3. The amendments reserved and confirmed to the State the power to provide, even by private and local acts, for bridging the East river, and to form a corporation by special act for municipal purposes, and to authorize and require a municipality to incur debt for its municipal purposes. It has been held in a very well considered case that the restraints on private and local legislation contained in the amendments cannot apply against a work to which no general act can be applicable, such as the completion of a special approach to a city park (*Hurlburt v. Banks*, 1 *Abb. New Cas.* 157; *Case of the Albany Park*, Opinion by WESTBROOK, J.; affirmed by court of appeals. S. P., *People ex rel. Kilmer v. McDonald*, 69 *N. Y.* 362),—so that the power to provide for the completion of this bridge would remain even if it were not expressly excepted. But the express exception clearly manifests the legislative intent that the amendments should not embarrass their power in reference to this work. 4. The amendments took effect on the first of January, 1875, which was after the enactment of all the statutes thus far mentioned. In this situation the legislature, at its first session after the amendments took effect, passed chapter 300 of the Laws of 1875. The main features of this act are that when two-thirds of the private stock should have been retired

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the company should be dissolved; that the mayors and comptrollers of the two cities, together with others appointed by the chief officers of the two cities respectively, should constitute a board of trustees for the purpose of managing and constructing the bridge (§ 2), "and shall have full power, control and direction over the plan and construction of said bridge; and the provisions of said chapter (c. 601, of 1874), in regard to the power and duties of the directors of said company, and the power and duties of the mayors and comptrollers of said cities therein provided, shall in all respects be applicable to said trustees, and said mayors and comptrollers, respectively." Then followed section 3, upon the construction of which the main question arises. There is nowhere else in the act any limit of cost or expense. 5. We have then in these statutes together a clear case in favor of the natural and ordinary meaning of the proviso in section 3, as in the nature of a limit on an appropriation, not a limit of power. The legislature create a board of officers, and charge them with the duty of erecting or completing the erection of a bridge, and expressly give them "full power, control and direction over the plan and construction of said bridge." They then authorize this board to make requisition on the municipal treasuries from time to time, "provided, however, the whole amount to be paid by both cities, shall not exceed \$8,000,000." This is in form a limit on the continuing power to draw without further appropriation. There is nothing to indicate that it was intended as a limit on the plan. If it had been, the proper place of the proviso was section 2, so as to give full power, control and direction over the plan, provided the entire cost of the structure should not exceed \$8,000,000. All the provisions of the act which relate to the subject confirm the natural and ordinary meaning, and repel the artificial construc-

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tion proposed. 6. There is no constitutional objection based on the objection that the act declares the two cities to be a consolidated district, for (a) It is a well-recognized principle that a clause, which it is not necessary to rely on, for the carrying of a statute into effect, cannot impair its efficacy. (b) The erection of a bridge to connect two adjacent cities is a "city purpose" with reference to each city. It would be a city purpose even if there were only one city, and the bridge were not entirely within its limits (*City of Philadelphia v. Field*, 58 *Penn. St.* 320; *Guilder v. Town of Otsego*, 20 *Minn.* 74; *Same v. Town of Dayton*, 22 *Id.* 366; *Burroughs on Taxation*, p. 75, § 57; *Union Pac. R. R. Co. v. Commissioners*, 4 *Neb.* 450). (c) By the common law, bridges were charges upon counties. This part of the common law was never adopted here, but bridges with highways of which they formed a part were charges upon the town (*Hill v. Supervisors of Livingston*, 12 *N. Y.* 52). Where the bridge was over a stream dividing two towns, the towns were liable for its construction and maintenance in equal shares, except where a different rule was imposed by special acts (*L.* 1841, c. 225; *Corey v. Rice*, 4 *Lans.* 141; *Beckwith v. Whalen*, 5 *Id.* 376). (d) The act of 1875 did not intend to constitute a new political division of the State, but solely to provide for joint action by the two cities in a common work. This is evident by section 12 of the act, by which it is provided that the title to the structure shall vest not in the consolidated district of the two cities nor in the inhabitants of such district, but in severalty in the two cities as separate municipal corporations. (e) The expense of building a bridge between the cities of New York and Brooklyn is therefore a city purpose for each municipality. (f) And the legislature have power to provide for the apportionment of the burden by commissioners (*Shaw v. Dennis*, 5 *Gilm.* [17.] 405, following *Thomas v. Leland*, 24

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Wend. 65 ; Commonwealth v. Newburyport, 103 *Mass.* 129 ; Carter v. Cambridge and Brookline Bridge Proprietors, 104 *Id.* 236 ; Dow v. Wakefield, 103 *Id.* 267 ; Waterville v. Kennebec County, 59 *Me.* 80 ; Matter of Zborowski, 68 *N. Y.* 96 ; People *ex rel.* Kilmer v. McDonald, 69 *Id.* 365).* (g) The consent of the municipality is not necessary (People *ex rel.* McLean v. Flagg, 46 *N. Y.* 601 ; People *ex rel.* Dunkirk, &c. R. R. Co. v. Batchellor, 53 *Id.* 128, 140 ; Ritchie v. Franklin Co., 22 *Wall.* 67). (h) The fact that the cities are declared to constitute a consolidated district, does not alter or affect the continuance of their antecedent organic individuality for every general municipal purpose (People *ex rel.* Wood v. Draper, 15 *N. Y.* 532 ; People v. Pinckney, 32 *Id.* 377 ; Rusch v. City of Davenport, 6 *Iowa*, 443-450). (i) Whatever may have been the object of declaring the two cities to constitute a consolidated district—whether to avoid imposing on each a liability to private actions for damages in respect to the work, or to carry out the provisions in section 8, for concurrent jurisdiction or otherwise—the purpose of the structure and of the loan, and taxation necessary to erect it, remained precisely what it was, independent of the creation of such a district ever since it was declared a public highway, viz., a city purpose, and by the very terms of the act the title to the structure is vested in the cities respectively. The creation of the district was only a mode of, or incident in, effecting this purpose. 7. If there were doubts on this question this objection could not prevail. The unconstitutionality must be clear to war-

* So if a county contracts a debt in building a bridge, but, before the debt becomes due, a new county is created in part out of it, the legislature has power to appoint commissioners to ascertain and award the amount that the new county shall pay as its share of the debt. People v. Alameda County, 26 *Cal.* 641.

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rant disregarding the law. "If the purpose designed by the legislature lies so near the border line as that it may be doubtful on which side of it it is domiciled, the courts may not set their judgment against that of the law-makers." So held on a question whether a tax was for public purposes, and the proper needs of municipal or local government (*Weismer v. Village of Douglas*, 64 *N. Y.* 91, 99, *FOLGER, J.*, 6 *Supreme Court [T. & C.]* 514. And see *Bank of Rome v. Village of Rome*, 18 *N. Y.* 38).

VI. No action by the board of estimate and assessment is necessary. 1. The charter only charges the board of estimate and apportionment with estimating the "amounts required to pay the expenses of conducting the public business of the city and county of New York" (Charter, *L.* 1873, p. 517, c. 335, § 112). And additional power to pass on the issue of bonds, even to pay the principal of outstanding bonds, was not implied, but was expressly given by a separate clause (*Id.* 518). 2. The common council constitutes the legislative power of the city, and that is not restrained by the powers of the board of estimate and apportionment. If the common council were confined in the exercise of its authority to matters for which the board of estimate and apportionment would make appropriations, the legislative power, in this respect, would be vested in that board and become subordinate to the finance department. It was never designed that the appropriations of the board of estimate and apportionment would control legislative action which the charter warranted (*People ex rel. Schanck v. Green*, 64 *N. Y.* 499, reversing 6 *Hun*, 11. *S. P.*, *People ex rel. Myer v. Board of Assessors and Green*, 53 *How. Pr.* 280, 284).

VII. The allegation is made that the structure will obstruct navigation. The decision of the secretary of war is conclusive on this point. This question has

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been the subject of litigation in the United States courts and has there been decided in favor of the trustees by Judge JOHNSON (*Miller v. Mayor*, 13 *Blatchf.* 469). It is assumed that the State courts will follow that decision.

VIII. The relator applied solely for a peremptory mandamus. We understand that the stipulation waives all objections to the remedy, but if not—1. The reasons dictating such application are plain. The final decision of the court of last resort on an alternative writ could not be had for years. Unless there is a dispute of material facts, the controversy can be and should be disposed of on application for peremptory writ. Such is the constant practice of the courts. Public necessities require a determination of the question involved at the earliest possible time. 2. We conceive that there are no issuable or material facts in dispute; certainly whether Tweed had sworn to some statement or not cannot be material. The only allegation in the affidavit of Kelly of any relevancy is that the trustees are so proceeding that the work will not be finished within the appropriation made. 3. The remark of the learned judge that if he had even demonstrated the doubtfulness of the legal right, the writ of mandamus, upon well-settled principles, should not be granted, has no place in a discussion where the point to be determined is the meaning of a statute. The court must solve the doubt as to the construction of the statute, and when the court decides that point there can be no doubt as to the existence or non-existence of the legal right.

IX. The practice of the relator in this case is proper. 1. Mandamus is the proper remedy whenever there is a clear right connected with a clear legal duty; no discretion exists to refuse the peremptory writ. "There is no doubt that where a party has no other specific legal remedy, the court will assist him by issu-

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ing its prerogative writ, in order to his obtaining such right" (Judge MANSFIELD in *Dr. Askew's Case*, 4 *Burr.* 2188). It is the only remedy of the trustees. The trustees are public officers, whether State agents or agents of the two municipalities it is unnecessary to determine. No title to the moneys to be paid vests in them, and it is doubtful if they could maintain suit for such moneys. They stand in a similar relation to the city to that occupied by its board of education, police, or its fire commissioners. 2. In England, the rule is well established that to compel a performance by a municipal corporation of a duty enjoined upon it by law, the mandamus will be either against such corporation or against the particular officers whose duty it is to act in the premises (*Tapping on Mandamus*, 316; *Rex v. Abingdon*, 2 *Salk.* 699). The same rule obtains in this country (*People v. Common Council*, 3 *Abb. Ct. App. Dec.* 502; *Mayor v. Lord*, 9 *Wall.* 409; *Dillon on Municipal Corporations*, § 699; *Moses on Mandamus*, 200). 3. The relator has sufficient standing to maintain the proceeding. He alleges that the application is made on behalf of and by the direction of the board of trustees. The technical parties to a mandamus are the people and the parties proceeded against. It is only necessary to show an interest in the relator to the extent that it may appear he is not an officious intermeddler. In matters concerning the public interest any citizen may intervene (*People v. Supervisors of Sullivan*, 56 *N. Y.* 249; *People v. Collins*, 19 *Wend.* 56). 4. Under the case in 3 *Abb. Ct. App. Dec.* above cited, had the corporation never acted, it would have been incumbent on the relator to proceed against the common council, so that that board might designate the particular officer to act, and the specific character or style of bonds to be issued. But this department of the corporation acted and discharged its duties by the ordinance of May 8, 1876, enjoining

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the comptroller to borrow the moneys and issue the bonds. The affidavit of the relator specifically charges that the default of the city is caused by the neglect and failure of the comptroller, and this is not denied. Therefore the mandamus is well taken against that officer (*People v. Flagg*, 16 *Barb.* 503; *People ex rel. Taylor v. Brennan*, 39 *Id.* 522). The resolution of September 3, 1878, does not relieve the comptroller from this duty. First, it does not in terms repeal or abrogate the previous ordinance, but solely requests the comptroller to withhold the further issue of bonds until the legal question is judicially determined. This application is the only proceeding in which such judicial determination can be had (*People ex rel. McSpedon v. Haws*, 34 *Barb.* 69). But further, if it be contended that the resolution was intended to have any greater effect, then it was void. The common council could doubtless have transferred the duty of executing the bonds to any other officer; this the resolution did not attempt to do. But it could not pass a resolution the effect of which was to violate the law and refuse altogether to execute the duty imposed. There is no necessity for an audit or allowance of any vouchers. The auditor is to settle and adjust all claims in favor of or against the corporation, and all accounts in which the corporation is concerned as debtor or creditor. This is not a claim against the corporation, nor an account in which the corporation is concerned as debtor or creditor. But further, the act of 1875 provides in express terms the prerequisites for payment of the money, to wit: calls on the city by request made to the mayor and comptroller. With these requirements the trustees have complied. But if the court should be of opinion that the other officials of the city of New York should be parties to the proceeding, a proper order can be made on the second application. The same writs may command several per-

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sons to do several acts if the performance of all such acts be necessary, in order that the ultimate object of the writ may be attained (*Tapping on Mandamus*, 325 ; *Rex v. Middlehurst*, 1 *Wills*, 283). Nor is it any answer that demands have not been previously made on such officers (*Commonwealth v. Commissioners of Alleghany*, 37 *Penn. St.* 237 ; *Same v. Same*, *Id.* 277). So in this district writs of mandamus have been simultaneously issued against both the auditor and comptroller (*People ex rel. Duffin v. Earle*, 46 *How. Pr.* 308 ; *People ex rel. Hawley v. Earle*, *Id.* 267).

BY THE COURT.—EARL, J.—By the act, chapter 399 of the *Laws of 1867*, certain persons were incorporated as “The New York Bridge Company” for the purpose of constructing and maintaining a permanent bridge over the East river, between the cities of New York and Brooklyn. The capital stock of the company was fixed at \$5,000,000, and full authority was conferred upon it to construct the bridge, and to acquire the necessary lands for that purpose. The bridge was required to be not less than one hundred and thirty feet above high tide at the middle of the river, and was to be so constructed as not to obstruct free and common navigation of the river. The two cities were authorized to subscribe to the capital stock of the company such amount as two-thirds of their common councils respectively should determine, and they were also authorized to take the bridge and acquire all the property therein upon terms specified in section 7 of the act.

Under that act the city of New York subscribed to the stock of the company \$1,500,000, and the city of Brooklyn subscribed \$3,000,000, which subscriptions were paid.

On February 20, 1869, an act (chapter 26 of that year) was passed, amending the prior act. It pro-

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vided that the two cities should be represented in the board of directors of the company by certain of their officers, and that the company should proceed without delay to construct the bridge.

On March 30, in the same year, an act of congress was passed, entitled "An act to establish a bridge across the East river, between the cities of Brooklyn and New York, in the State of New York, a post road." It declared the bridge to be constructed under the first act above mentioned, when completed in accordance with that act, to be a lawful structure and post road for the conveyance of the mail of the United States, provided that it should be so constructed as not to obstruct, impair, or injuriously modify the navigation of the river. The bridge company was required to submit to the secretary of war a plan of the bridge, together with other information, so that he might determine whether the bridge, when built, would conform to the prescribed conditions as to obstructing, impairing, or injuriously modifying the navigation of the river, and the secretary of war was authorized and directed, upon receiving such plan and other information, and upon being satisfied that a bridge built on such plan would conform to the prescribed conditions, to notify the company that he approved the same, and upon receiving such notifications, the company was authorized to proceed to the erection of the bridge, conforming strictly to the approved plan.

The East river is a public navigable water, and to bridge it required the concurrent authority of the State of New York, and of the United States; of the former, by reason of its rights in the lands on the shore, and under the water, and of its qualified sovereignty over the water; and of the latter, by reason of the exclusive power of congress to regulate commerce, and to determine in its regulation thereof to what ex-

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tent navigation upon the water may be obstructed or interfered with.*

That congress may authorize a bridge over a public navigable water which will, to some extent, obstruct or interfere with navigation, cannot be disputed (*Wheeling Bridge Case*, 13 *How. U. S.* 519; 18 *Id.* 421; *Miller v. Mayor*,† 13 *Blatchf.* 469).

In 18 *How.* it is said: "The power of congress to regulate commerce, includes the regulation of intercourse and navigation, and consequently the power to determine what shall or shall not be deemed in judgment of law, an obstruction of navigation."

In 13 *Blatchf.*, a case involving this bridge, Judge JOHNSON, after reviewing the authorities, said: "It results from the cases considered, that the authority of congress is paramount, in the regulation of commerce, under the constitution, and that its determination in respect to interference with navigation, by obstructions thereto, is conclusive. What it authorizes may be justified upon its authority. What it forbids is necessarily unlawful. Nor is it to be forgotten that this power of congress is at all times capable of exercise. If it should turn out that the judgment of congress has been mistaken, it can by law require the bridge to be altered, or removed, and can adapt its regulation of commerce to its view of the public interests."

Congress, in the exercise of its power to regulate commerce and navigation, could itself approve the plan

* Compare *Woodman v. Kilbourn Manuf'g Co.*, 1 *Abb. U. S.* 158; *State v. Eau Clair*, 40 *Wis.* 538.

† Where the charter of a railroad company authorized them to construct a bridge across a navigable stream, provided such bridge was located at a point convenient to navigation,—*Held*, that the question whether the bridge was so located, was between the State and the company exclusively, and could not be tested in an action against the latter by a private individual. *Stephens, &c. Co. v. Central R. R. Co.*, 84 *N. J. L.* 280; 4 *Vroom*, 229.

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of the bridge, or it could prescribe a mode in which it could be done. Hence it was competent for it to devolve upon the secretary of war the power to approve or prescribe the plan for the construction of the bridge. By so doing it did not abdicate its power, but provided an agency, as it does in most other cases, for the complete and practical exercise of its power; and it still retained control of the whole subject by the power expressly reserved, at any time to alter, amend or repeal the act.

In compliance with the requirement of the act, the bridge company submitted a plan of the bridge to the secretary of war, which was approved by him subject to certain conditions. One of the conditions was that the main span of the bridge should not be less than one hundred and thirty-five feet in the clear above high water; and another was "that no guys or stays shall ever be attached to the main span of the bridge, which shall hang below the bottom cords thereof." And on June 21, 1869, he notified the bridge company of such approval. The act of congress did not provide how such notice should be given, and hence the secretary of war, having himself considered and approved the plan, could convey such notification in person or by mail, or in any other way which would be effectual. He did it through one of his subordinates, and it cannot be doubted that that was a compliance with the act.

Having thus the authority of congress, and of the State legislature, the bridge company proceeded with the construction of the bridge, until the year 1874. During that time it was under obligation, under the State law, to construct the bridge so as not to obstruct "the free and common navigation of the East river," and under the act of congress, to construct it according to the plan approved by the secretary of war.

In June, 1874, another act was passed by the State

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legislature (chap. 601 of that year), entitled An act to amend the act of 1867 "and to provide for the speedy construction of said bridge." Section *one* of the act provided that when the two cities should by vote of their common councils respectively, or when either of them should accept the provisions of the third section of the act, and when the owners of two-thirds of the private stock bridge company should accept the provisions of the second section, then and thereafter, the board of directors of the company should consist of twenty members, eight persons to be appointed by the mayor and comptroller of each city, and such mayors and comptrollers. Section *two* provides that whenever any private stockholder of the bridge company should give his assent to that act by an instrument in writing, signed, acknowledged, and recorded as prescribed, the directors to be appointed under the act were authorized to purchase the rights of such stockholder, which rights were to be determined by the amount paid by such stockholder, together with interest, and to provide for the payment of such amount. Section *three* declared the bridge to be a public highway for the purpose of rendering the travel between the two cities certain and safe at all times, subject nevertheless to such tolls and prudential and police regulations, as the board of directors should from time to time establish ; and for the purpose of completing the bridge, the two cities, in addition to the amounts before subscribed by them, were respectively authorized to take and pay for further stock, the city of New York to the extent of \$1,000,000, and the city of Brooklyn \$2,000,000.

The effect of that act was to leave the bridge company as a corporation still in existence, and the two cities might or might not own all the stock ; and before any subscriptions to the stock were made under that act by the two cities, the constitutional amendments took effect, January 1, 1875, section 11 of article 8,

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which provide as follows: "No county, city, town or village shall hereafter give any money or property, or loan its credit, to or in aid of any individual, association or corporation, or become, directly or indirectly, the owner of stock in or bonds of any association or corporation, nor shall such county, city, town or village be allowed to incur any indebtedness, except for county, city, town or village purposes."

After this provision became a part of the State constitution, the legislative act of 1874 could not be carried into effect,* and to obviate this obstacle thus interposed, another act was passed May 14, 1875, entitled, "An act providing that the bridge in the course of construction over the East river, between the cities of New York and Brooklyn, by the New York bridge company, shall be a public work of the cities of New York and Brooklyn, and for the dissolution of said company, and the completion and management of the said bridge by the said cities." Section *one* provides that whenever two-thirds of the private stock of the company shall have been retired from the company by purchase, as provided by the act of 1874, the company shall be dissolved and the debts and liabilities of the same shall be paid by the trustees of the bridge, and the bridge then in course of construction, shall be completed and managed as provided in the act on behalf of the two cities, as a consolidated district, for that purpose; and then the act of 1874 is recited at length. Section *two* provides that within twenty days after the passage of the act, the mayor, comptroller, and president of the board of aldermen of the city of New York shall appoint eight trustees, and the mayor, comptroller and city auditor of the city of Brooklyn shall also appoint eight for the purpose of managing and constructing the bridge;

* Compare Fosdick *v.* Perrysburgh, 14 *Ohio St.* 472; Falconer *v.* Buffalo, &c. R. R. Co., 69 *N. Y.* 491.

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and the trustees thus appointed, together with the mayors and comptrollers of the two cities, shall constitute the board of trustees of the bridge, and shall have full power, control and direction over the plan and construction of the bridge. Section *three* provides that after the dissolution of the company the bridge shall be a public work to be constructed by the two cities for the accommodation, convenience, and safe travel of the inhabitants of the district, composed of the two cities; and that the expense of constructing and maintaining the same shall be defrayed by the two cities in the proportion of two-thirds by the city of Brooklyn, and one-third by the city of New York; and that for such purpose the trustees shall from time to time, as they shall deem necessary, call upon the cities for such sums as they shall deem proper in the proportions mentioned, "provided, however, that the whole amount to be paid by both cities shall not exceed \$8,000,000, and the city of New York shall not be called upon to pay a greater sum than \$1,000,000 in any one year, and the city of Brooklyn not more than two \$2,000,000, in any one year, until the said bridge shall be fully completed, and open for public travel." By sections *five* and *seven* the trustees are given full power and authority to purchase and hold for the two cities all real estate necessary for the bridge, to establish ordinances and laws regulating the use thereof, and the rates of toll for travel over the same, and to keep and maintain the same in good repair at the expense of the two cities. Section *eleven* provides that if any private stockholder of the company shall have declined to sell his rights in the company, as provided in section two of the act of 1874, the trustees are authorized to proceed at once to acquire the same for and in behalf of the two cities, in the manner provided in the preceding section for acquiring real estate. Section *twelve* provides that upon

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the dissolution of the bridge company, as provided in the act, the bridge and all its appurtenances, shall vest absolutely in and belong to the two cities.

After the passage of that act, the trustees mentioned therein were appointed. All the private stock of the bridge company was purchased as provided in the acts, and the company was dissolved. The trustees proceeded with the construction of the bridge, and received for that purpose from the two cities upwards of \$5,000,000, \$1,500,000 of which was from the city of New York, and in 1878 they made upon the city of New York two calls of \$500,000 each, which are the subject of the present controversy.

The act of 1875 is not, as claimed by the appellant, in conflict with the constitutional provision above recited. It was not the purpose or effect of the act to make the city of New York a stockholder in the bridge company, or to cause it to loan any money or credit to such company. It was the purpose of the act to extinguish the company, and vest all its property in the two cities for a public purpose. The cities already owned most of the stock and property of the company, and a way was provided by which they could become the owners of the balance of the property. This was to be accomplished by voluntary agreement with the private stockholders, and the payment to them of the value of their stock, and in case they could not make such purchase, then such property was to be taken by the exercise of the right of eminent domain. The two cities could be authorized to take this bridge for a public purpose as they could to take any other property for the same purpose; and the act provided the mode in which, through the trustees, they could do it. All the money they paid for stock or upon the debts of the company, was simply in furtherance of the purpose to vest the property of the bridge in the two cities, and it was not paid to aid the company, or to make the cities stock-

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holders therein. The effect was to be the dissolution of the company, and the transfer of its property.

Nor can it be said that the indebtedness authorized to be incurred by the cities for the construction of the bridge, was not for a city purpose. It is impossible to define in a general way, with entire accuracy, what a city purpose is, within the meaning of the constitution. Each case must largely depend upon its own facts, and the meaning of these words must be evolved by a process of exclusion and inclusion in judicial construction. It would not be a city purpose for the city of New York to build a railroad from that city to Philadelphia, or to improve the navigation of the Hudson river generally, between that city and Albany, although incidental benefits might flow to the city. Such works have never been regarded as within the legitimate scope of municipal government. On the contrary, it would be a city purpose to purchase a supply of water outside of the city, and convey it into the city, and for such a purpose a city debt could be created. So, lands for a park for the health and comfort of the inhabitants of a city could be purchased outside of the city limits, and yet conveniently near thereto.

Such improvements are for the common and general benefit of all the citizens, and have always been regarded as within the scope of municipal government; and so too, highways or streets leading into a city or village may be improved, provided the improvements be confined within such limits that they may be regarded as for the common benefit and enjoyment of all the citizens. It cannot, therefore, well be held, as claimed by the learned counsel for the appellants, that what is meant by a city purpose is some work or expenditure within the city limits. There could be no good reason for such a limitation. It could be no worse for a city to incur debt for city purpose outside of the city limits than for one within such limits, and

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there is just as much reason for allowing it to be incurred in the one case as in the other. The cities of New York and Brooklyn are intimately connected in many ways, by business, social, and commercial ties. Thousands who do business in one city do business in the other. The port of New York includes the whole river at the place where the bridge is to be constructed, and the commerce from all parts of the world which flows into that port, is discharged on each side of the river. To bridge such a water, separating two such cities, must be a city purpose of each city. The bridge will be for the common benefit of all the citizens of both cities, and each citizen will have the same right to use it as every other citizen. It would have been a city purpose if either city had been authorized to build the whole of the bridge, and it is no less so that both are to unite in building it. It has always been the policy of the State for two towns, separated by a stream of water, to bridge the stream at joint expense, and the construction of such a bridge is a town purpose of each town. If the legislature could not authorize these two cities to incur debt for the construction of this bridge, then it could not authorize towns to incur debt for the construction of bridges over streams dividing them. That it was intended by this clause in the constitution to prohibit towns from incurring debt for such a purpose, will not, it is believed, be claimed by any one. Suppose the river had been, like the Thames in London, or the Seine in Paris, wholly within the city of New York, it would not be disputed that it would have been a city purpose to bridge it. Can it be any less so that the river divides what would otherwise be one city? Suppose this river had been a small stream, like those usually dividing towns, which could be crossed only by a bridge, would not the construction of the bridge have been a city purpose, just as its construction would have

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been a town purpose, if it had been between two towns? The size of the river and the magnitude of the work certainly does not strip the bridge of the municipal character which it would otherwise have.* The legislature, when legislating in view of this constitutional limitation, must determine in the first instance what is a municipal purpose. Its decision is not, however, final. When its act is challenged, as in conflict with this constitutional limitation, the courts must determine whether debt is authorized to be incurred for a purpose not municipal. But as the dividing line between what is a municipal purpose and what is not, is, in many cases, shadowy and uncertain, great weight should be given by the courts to the legislative determination, and its action should not be annulled unless the purpose appears clearly to be one not authorized. As said by Judge FOLGER, in *Weismer v. Village of Douglas* (64 N. Y. 91), "if the purpose designated by the legislature lies so near the border line that it may be doubtful on which side of it it is domiciled, the courts may not set their judgment against that of the law makers."

It is not perceived for what purpose the language as to a consolidated district, found in the first section of the act of 1875, was inserted. Whatever the purpose was, it has no bearing upon the constitutional questions involved. The bridge was to be constructed and managed by the two cities, and when completed was to belong to the two cities as tenants in common, each owning a share proportionate to the money contributed by it. So far as I can perceive, this language could be stricken from the act without in any way impairing any of the essential provisions of the act, or affecting the purpose to be accomplished by it.

* See also *Union Pacific R. R. v. United States*, 10 *Cl. of Claims*, 548.

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Therefore, having nothing to say about the wisdom of the legislation under consideration, I am confident in the conclusion that the construction of this bridge is a city purpose of each city, and that each city can incur debt for the same, and that the act of 1875 is not in conflict with any provision of the constitution.

After the passage of the act of 1875, it was no longer necessary so to construct the bridge as in no degree to obstruct the free and common navigation of the river, as required by the act of 1867. At the time of the passage of the act of 1875, a plan of the bridge, approved under a public act of congress, had for some years been adopted and acted upon. That plan showed precisely to what extent the bridge would obstruct navigation upon the river, and more than \$5,000,000 had been expended upon the bridge. The plan and character of the bridge must be assumed to have been known to the legislature, and the act of 1875 is an act providing for the completion of the bridge then in course of construction, and the trustees to be appointed under that act are required to complete that bridge. There was then a legislative approval and sanction of the bridge as then being constructed according to the plan prescribed by the act of congress, and thereafter the trustees were required only to conform to the plan thus adopted and approved in the construction of the bridge. So long as there is no departure from such plan, the structure could not be assailed as an obstruction to navigation. What is thus sanctioned both by the State and national legislatures cannot be a nuisance, or otherwise unlawful.

There is no allegation on the part of the defendant that there has been any departure from the approved plan in the construction of the bridge except in one particular, and that is as to the guys or stays. He alleges that guys or stays have been and are attached to the main span of the bridge, which hung below the

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bottom cords thereof. There is no allegation that those guys or stays are to become a permanent part of the bridge; but they are used only, as seems to be conceded, in the construction of the bridge; and it may well be doubted whether such temporary appliances are within the condition prescribed by the secretary of war. But if the guys or stays are unauthorized, such a departure from the approved plan would not justify the defendant in withholding the payment of this money. The duty is not imposed upon him, as comptroller of the city, to see that there is no departure from the plan in the construction of the bridge. He is to pay the money when properly called for, and then it is the duty of the trustees of the bridge to properly apply and expend it. If they do not discharge their duty, if they commit a breach of trust, or if they disregard the plan in any material matter, the defendant, as one of the trustees, can go into the proper courts, State or Federal, and compel an observance of their duties, and conformity to the plan.*

The defendant also alleges, as a justification of his refusal to pay, that the trustees are extravagant in the expenditure of the money intrusted to them, and that the bridge would be useless and unsafe when completed upon the present plan. These matters do not justify the defendant's refusal. The trustees are appointed pursuant to law, to disburse the money. In its disbursement there may be a certain amount of extravagance and wastefulness, flowing from misjudgment or folly, for which there is no remedy. But if they be carried to such an extent as to be reckless and criminal, a court of equity, upon proper application to it, may restrain and control the trustees to prevent the waste of the trust funds. The defendant is a member

* See also *Lander v. McMillan*, 8 *Jones (N. C.) L.* 174; *Cass v. Pittsburgh, &c. R. R. Co.*, 80 *Penn. St.* 31.

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of the board of trustees, and as such has opportunities of knowing how the money is expended. If he cannot, as a member of the board, prevent its waste, he may take preventive action in the courts. But he cannot refuse to pay the money. The money thus paid may not be wasted. It would be quite a novel doctrine that the custodian of public money, directed to pay it to persons charged with the duty of expending it, could withhold payment because of the apprehended extravagance of those appointed by law to expend it.

The issue as to whether the bridge will be useless and unsafe could not be tried in this proceeding. The legislature has directed the bridge to be completed and has sanctioned the plan adopted. It authorized the appointment of trustees, who were given "full power, control, and direction over the plan and construction of the bridge," and it made it the duty of the defendant, as comptroller, to pay the money to them. He cannot withhold payment, because, in his judgment, the bridge will be useless and unsafe, or because it will, in fact, to a large extent, be so.

But the most serious question is yet to be considered. The defendant claims that under the act of 1875, the trustees had no power to proceed with the construction of the bridge and to call for any money from the two cities, and that the cities had no power to pay any money to the trustees, unless the bridge could be completed for not more than the sum of \$8,000,000. A careful consideration of the whole subject has constrained us to take a different view of that act.

The legislature has, at all times, apparently regarded this bridge as of great importance to the two cities, and has appeared to be solicitous about its completion. In the first act, that of 1867, it authorized the two cities to subscribe an unlimited amount to the capital stock of the company, and ultimately to become the absolute owners of the bridge. It conferred upon the company,

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the sovereign power to take lands for the purposes of the bridge, by the right of eminent domain, thus treating it like corporations organized to construct railroads, in which the public are supposed to have an interest. In the act of 1869, it provided for a representation of the two cities by three of the principal officers of each in the board of directors, and directed the company to proceed with the completion of the bridge without delay. The act of 1874 was entitled an act, among other things, "to provide for the speedy construction of the bridge," and the scheme of that act was to place the company under the control of the two cities, and vest all the stock of the same in the two cities. The directors to be appointed under that act were to hold office until the completion of the bridge. The act declared the bridge to be a public highway, and for the purpose of completing it authorized the two cities to advance further sums of money, and take stock therefor, and it provided for the application of the income of the bridge after its completion. All the provisions looked to a completion of the bridge, and no limitation was placed upon the cost thereof. The act of 1875 is entitled an act, among other things, providing for the completion and management of the bridge. The whole act has in view the completion of the bridge and its management after completion. It is provided that "it shall be completed and managed as hereinafter provided for and on behalf of the cities," that the plan and construction thereof shall be under the control and direction of the trustees; that it shall be a public work to be constructed by the two cities; and that the expense of constructing and maintaining it shall be defrayed by the two cities in the proportion mentioned; and then it is provided that the trustees shall call upon the cities for the needed funds "provided, however, that the whole amount to be paid by both cities, shall not exceed \$8,000,000." There is no requirement that the

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trustees shall first estimate the cost of the entire bridge, or that they shall not enter upon the construction thereof unless the expense can be kept within \$8,000,000. If it had been intended that the trustees should not enter upon the completion of the bridge, without first determining that in no event it should cost more than that sum, a matter of such controlling importance would have been expressed in plain and explicit language. When the entire legislation upon the subject is considered, the inference is not warranted that the legislature meant that the structure, then partially completed, upon which upwards of \$5,000,000 had been expended, should be abandoned, unless the expense of its completion could be kept to the sum mentioned.

The construction of the bridge was a work of great magnitude, unparalleled in the world. The difficulties that might have to be encountered could not be foreseen. It was a work requiring some years for its completion, and the fluctuations in the price of materials and labor could not be anticipated. Another uncertain element in the cost of the bridge was the interest on all the sums advanced by the two cities from time to time, which was to be added to the cost, and no one could forecast the amount of interest which would thus accumulate by necessary delays in the completion of the bridge. The nature of the work was such that it could not have been expected that it could be let by contract.

These considerations show that it would have been impossible to estimate in advance the precise or even proximate cost of the bridge. And yet, if the contention of the defendant be sound, if the trustees had first made an estimate, bringing the cost within the sum named, and they or their successors had entered upon the construction of the bridge, and if it had subsequently, unexpectedly and unavoidably, turned out that the cost would exceed that sum by a few thou-

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sand dollars, the whole expenditure would have been unauthorized and illegal, the trustees disbursing the moneys in good faith would have been personally liable, and the bridge itself would have been an unlawful structure.

A construction reaching such a result cannot be the correct one. The legislature intended the bridge should be completed. The work was of such exceptional character that it did not know, and no one could know, what it would cost, and hence no limit was placed upon its cost. It was probably supposed that the \$8,000,000 would be sufficient to complete the bridge, and that was the amount appropriated or made available for the trustees. It was a limit to the amount which they could draw from the two cities, and was a constant admonition to them to keep the expenses within that sum. But they were to go on with the construction of the bridge, and were authorized to draw that sum if needed, and when they had drawn up to that limit they were to stop, and await further legislative authority. The legislature could then authorize more money to be paid by the two cities, or could appropriate sufficient money from the State treasury. The proviso was, not that the bridge should not cost more than \$8,000,000, or that it should not be constructed if it was to cost more, but that the two cities should not be called upon to pay more.

I have carefully examined the authorities cited on the argument upon the point last discussed, and find nothing in any of them having any important bearing, and hence they are not referred to here.

Having thus given this case the careful examination its magnitude requires, I feel confident in the conclusion that the order appealed from is right, and should be affirmed.

RAPALLO, ANDREWS and DANFORTH, JJ., concurred.

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FOLGER, J. — [Dissenting.] — The question which has most grasped my mind is whether the legislature meant to fix a bound to the cost of the bridge. I have been led to think that it did. Such, it seems to me, is the true construction of the act of May 14, 1875.

I am aware of the rules of law, that a grant of general power carries with it the right to do everything that is needful or fairly incidental to the due execution of that power (*Foot v. Salem*, 14 *Allen*, 92), and that where there is no express limitation upon the power given, an inferential or implied limitation, that would defeat the object of giving the power, cannot be made nor sustained (*Cook v. Commissioners*, 6 *McLean*, 112), and as following therefrom, that if a statute, giving a power and making it a duty to construct a public work, provides an appropriation in a sum named, the sum does not by inference or implication define or limit the power.

But when all this is conceded, it is also to be conceded that the legislature may, in its wise foresight, give a power, express the gift in general terms, and yet fix the bound of cost beyond which the use of the power cannot go. Thus, when a general act declares that no contract shall be made by certain officers of government, save under a law authorizing the same, or under an appropriation big enough for the fulfillment of it, and an act then gives power to cause a public work to be constructed, it is not enough to warrant a contract for the work ; there must be a power thereto in express terms, or an appropriation large enough for it. So that it comes at last to this, whether, by the words used in an act, the legislature, though it has given power in general terms, has not also put a bound to the cost. In my judgment, both the words used in this act, and the help to the interpretation of them yielded by the legislation *in pari materia*, show that

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the legislature meant to name a sum which should be the bound of cost.

It is with modest feeling that I suggest, that the question has been hidden somewhat in mistaken analogies. The act has been treated as one providing for the doing of a work of that general public, of which the legislature is the prime representative in giving the power and directing the raising of means ; and as one providing that one set of public agents shall make the plans and do the work and make the payment therefor, and another set of public agents raise the means of payment and hand them over on call. The case is not that, nor like that. The act, at the point of view at which we now are, is simply this ; one which permits the two cities to complete the bridge, and to pay therefor by money raised by bonds, ultimately to be redeemed by the avails of taxation. The provision for trustees, though seeming to form a body of some importance, is merely the making of a new set of municipal agents. What they do is for the cities, and not for themselves, nor any other principal. The parties to the act are only the legislature and the two municipal bodies. We should look upon them thus. The two cities ask from the legislature its permission to finish the bridge. The legislature says to them : You together may finish the bridge ; you pay therefor by your bonds ; but the whole amount to be paid by you both, for that purpose shall not exceed \$8,000,000.

To say that this does not restrict the cost, it appears to me to rest in names, and not reach things. Only these two cities can finish the bridge ; only they can pay therefor ; yet they can pay no more than a sum named. When that sum has been used in bridge-building, the work must stop. It may need more to finish it ; but as no more can be paid out to finish it, it can cost no more. That is to say, there is then no lawful power to lay out another cent upon it. The force of

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the act has been spent. Who is to say that the legislature will again give power to raise and expend other millions or thousands? Until the legislature does give power, no more can be raised and expended; and until then, that structure can never be of any more cost to the two cities. Whatever be its stage of progress, useful or useless, the authorized limit of the cost of it has been reached. Such is the logical result in 14 *Allen, supra*. It was held there that the words of the act, in that case, authorized the issue of scrip to an amount not exceeding in the whole "a sum named," was a limit to that amount of the permanent municipal debt which could be made; but that it was not a limit on the whole cost of the work, for there was open to the city the means of temporary loans or local taxation. Had the words been there, as they are here, "the whole amount *to be paid* shall not exceed \$8,000,000," would not a parity of reason have made that sum a limit to which expenditure could run? And would not that be a limit upon actual cost, whatever might be the cost to which plans resting in contemplation would run, if completed? (*Hasbrouck v. Milwaukee*, 13 *Wis.* 37). Let me make an illustration. If I should say to one, I make you my agent, go and buy for me a steamship, and you may give my note for the price, I put no limit on the price that he may give or on the amount of the note he may make. If I say to him, buy for me a steamship, yet the whole sum to be given for her must not exceed \$800,000, and to that amount you may issue my notes; there is clearly a bound beyond which he may not go. Nor is the case different, when I give the authority to buy to one agent with power to call on another agent for the means of payment. Nor is it an impossibility, either in law or in fact, to put a limit on the expense, where the cost of the project is not to be exactly ascertained at the start. Though it may be problem-

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atical, and contingent, it is my right, and it is in my power, by the use of words, to hold my agent within a limit. Thus, I may say to an agent, build me a steamship of such tonnage and power, but it must not cost more than a sum named. He is bound to keep in mind the limit I have fixed. If he reaches it, and the work is not done, he may not go on. What is his position as to liability to me for having improvidently begun, when he could not reasonably expect to finish, it is not needful here to say. What is his liability to others, with whom he has made contracts beyond the means promised to him, has been decided by the court in *Paulding v. Cooper*, not yet reported.* If a natural person may put such a limit upon delegated power, there is no reason why any other giver of power may not do so.

It is then a question of the meaning of the phrases used in giving it. When we turn to section 3 of the act of May 14, 1875, we see that the pith of it is to confer authority upon the two cities to build the bridge, and to issue their bonds to raise the means to meet the expense, but with a limit upon that expense which need not be more succinctly or more plainly expressed than in the language of the act, "provided, however, that the whole amount to be paid by both shall not exceed eight million of dollars." The amount which they have power to pay must be the amount to which they may go in expenditure, and the amount to which they may go in expenditure is the amount which the

* In this case it was held in the supreme court (10 *Hun*, 20), that plaintiffs were charged with the duty of keeping the work within the limit authorized by the act, and whenever a contract was made they were charged with the duty of keeping the amount necessary to perform it. It was the duty of the commissioners to keep inviolate the appropriation, hence they were liable personally because they either contracted in excess of their power, or contracted with funds, and misappropriated the funds.

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work may cost. Though the plans may have been made so large by design, or ignorance, or mistake, as to be too great for the sum authorized; that does not warrant going on, when the limit has been reached to which expenditure may run. The work must stop, and it is for the source of power to consider what shall then be done. In my judgment, when the legislature had passed the act of 1875, it, for the time being, had done with the matter. The bridge was not a State work, like the Erie canal or the State capitol, which the State was doing, and for which the legislature was making and to make appropriations from time to time. It was a local municipal work, as to which the legislature had no more at that time to say than to give permission to do it, and with power to affix conditions to the permission. So that the considerations which are urged, drawn from the nature of a public work involving much expenditure and much time to do, and needing only appropriations, from year to year, of comparatively limited amount, are not in place here. Those considerations are appropriate where the legislature is the one agent of the public, whose function it is to direct the work and raise the means, and there are other agents of the public, whose function it is to devise the plan, and to do the work and lay out the money. But here are two corporate entities, with no power to enter upon a project conceived to be of municipal utility, who came as petitioners to the legislature, which may give or withhold, and may affix conditions and limits. The legislature gives to them power to build, power to pay out for the building, and power to raise the money in a certain way. It is a single grant of power to single entities. The actors who are to use each branch of the power are the same. In using each branch of it, they can go no further than the bounds of the power given, and that bound is upon the whole power and upon each branch of it. It is

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plain, I think, that the two cities are in a different position from that above indicated of separate agents of the general public. Nor, in my judgment, is the case like that in 6 *McLean*, *supra*. There a county was authorized to do a work. As well as can be gathered from the opinion in the case, and the head-note (for there is no statement of facts), an issue of bonds to the amount of \$200,000 was authorized and no other means of payment were provided for. But there were no words of restriction, as there are here. It was held that the specification of the amount to which bonds were to be issued was not an implied limitation upon the cost of the work. One argument raised is that in all public works, either by Federal or State governments, it is not usual to appropriate, when the work will require several years for its completion, more than a small part of the necessary expenditure (at once, I suppose, is to be understood), as any other course, especially when the money must be loaned, would be wasteful. It will be seen, at once, that this reasoning does not apply to this case. For here it is expressly said, that the whole amount to be paid shall not exceed \$8,000,000.

Besides, the wasteful expenditure "likely to arise from a single appropriation in gross," is guarded against by a limit upon the amount which shall be paid in each year, to wit: \$1,000,000 by one city and \$2,000,000 by the other; and by the provision that the interest on all bonds issued shall be counted as part of the gross sum of \$8,000,000. Then the words here, "the whole amount to be paid shall not exceed," is a limit on what may be paid, put upon the two cities, and no other person or body is to build and to pay, is it not a limit upon the right to incur a liability to pay, which is the same as a limit upon what the work may cost? That is to say, it is a prohibition upon doing more work than that sum will pay for; which is a

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limit upon actual cost, for there can be no further cost, without the intervention of the legislature giving further power to raise and pay money.

I think, too, that the history of this enterprise, as shown in legislation, indicates forcibly that it was the purpose of the legislature to set up a limit of cost. It was started as a private enterprise, doubtless with the notion, at first, of private gain therefrom. The amount of the capital stock is, it is true, not the limit to which a corporation may go, in the purchase or expenditure for property. Yet, when persons ask of the legislature a charter for a purpose, the sum at which they name the capital is an indication to the law-makers of what is then thought to be enough, to set the corporation going and making profits. The corporation started with a named capital of \$5,000,000, but with the not universal power to increase. The project looked so feasible and so fruitful, at that sum, that though the privilege was given to the two cities of taking the work from the private corporators, it was upon conditions, that the property should be paid for by the two cities, at cost, and at premium of thirty-three and one-third per cent. in addition, and that the bridge be made free. The cities were permitted to become stockholders, but with no provision for a voice in the management. That provision was made two years after, when, as we may infer, the work began to look too large for private means; and then the requirement was made that the bridge be built by June 1, 1874. It was not then done; but on the fifth of that month, an act was passed to amend the original act, and "to provide for the speedy construction of the bridge;" and from it it is apparent that need was felt of public aid. For the purpose of completing it the two cities were authorized to subscribe \$3,000,000, in proportions named.

The use of this phrase "for the purpose of completing it," connected with the amount named, is signifi-

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cant. Here was an indication of the legislative conception, at that time, of what money was needed to complete the bridge, and of the sum which the legislature would permit the two cities to pay therefor. And as further indication of a purpose to limit the amount, was the singular provision that the interest of the bonds issued under the act should form part of the cost, and should be deducted from the amount of payment. I can but regard this peculiar provision as significant of a purpose to restrict the municipal expenditure to the sum named and expressly warranted by the legislature.

In May 14, 1875, came the act immediately before us, when the purpose of building the bridge by private enterprise seems to have been given up as too large for private hands, and the legislature was asked to permit the two cities to become the only builders and owners of it.

I think that we can see, from its previous guarded action, as shown in the statutes passed, that the legislature was not willing to put the cities upon a work of unrestricted cost, and that the proviso already quoted is charged with more meaning and intensity, from the previous legislative action. I think, too, that these repeated applications to the legislature, for new and varied enactments, made it plain to the law-maker that the cost of the work would be liable to run beyond first expectation, and that, for the safety of the cities, there should be set up a bound, beyond which expenditure and liability should not go, without renewed legislative permission. There is the provision above alluded to, and related in this act, that the interest upon all bonds issued by the two cities should be charged as part of the construction, and be withheld from the annual payments. If the purpose was to have the two cities build, whatever it might cost to carry out the plan, or if the purpose was to have the

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bridge built, whatever might be the cost, where the good or saving of this provision? Of what avail to withhold an amount equal to the interest, and to make it part of the cost, unless it was to keep the cost from going beyond the limit of \$8,000,000, the amount of the principal sum for which bonds could be issued? If the cost could go beyond that sum, it would have to be made up in principal of bonds, or by taxation, or other way of raising money. This provision is certainly significant of the purpose to fix a limit to the cost of the work. There may have been the purpose also to compel the diligent prosecution of the work, and the speedy raising of the money upon the bonds called for and issued, and the prompt disbursement of it in the work. But a chief design would seem to be that the cities should not lay out upon the bridge more than the sum named as the limit of the principal of the bonds they might issue; and as, by the provisions of this act, none but the two cities could lay out money upon it, it was effectual that the cost of the bridge could not go beyond that sum.

It is said that the legislature provided by the act that the bridge should be a public work; and should be constructed by the two cities, for the accommodation, convenience and safe travel of the inhabitants of the district. It is argued thence, that the chief idea in the legislative mind was the finishing of the work in a manner safe and sufficient, and that the cost of doing it was a minor consideration.

I do not think that we can justly say that. The constitution enjoins upon the legislature that it shall restrict in cities the power of taxation, contracting debts and loaning their credit. (*Const.* art. 8, § 9). Can we properly attribute to legislative action, in a particular case, that in framing a statute to meet it, it lost sight of, or seeing, was careless of its general constitutional duty? For my part, I had rather come to

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the interpretation of a legislative act with a sense of the existence of this constitutional injunction, and with a feeling that the law-maker acted in the presence of it.

Beside, I can not agree that, in looking at a law providing for work that will cost money, to be raised finally by taxation, it is the proper judicial mood, to assume or to concede that the legislature was not prudent and forecasting, and had no thought of the burden it was about to lay upon the people. It would not be wise or honest for it so to do. It would be reckless and improvident. Hence, when words of restriction are found in a statute authorizing a work, costly at the best, they are not to be narrowed in their reach, by the assumption that the legislature looked only at the utility of the work when done, but to have a liberal and broad operation, and to be applied to all parts of the act which may fairly fall within their force, upon the other assumption that the legislature will not carelessly delegate the power to burden the people with debt, but will, as prudent agents, count the cost.

So when I read the act, by which it is declared that the bridge is to be constructed in the manner above indicated, and that the expense thereof shall be defrayed by the two cities, and I find it further declared, that *for such purpose* they may be called on for yearly payments, but that the whole amount shall not exceed \$8,000,000, I am unable to repel the conviction that the legislature meant that the two cities should carry out "such purpose" by the expenditure of not more than that sum: and that the amount named is a limit upon "such purpose," as well as upon the liability of the two cities to pay for "such purpose." I think that the language of the act, in its restrictive words, applies to all that goes before them in the section in which they occur, and that "expense of construction, &c.," is as well limited by them as the amount to be

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paid by the municipalities, which alone can lawfully construct it. The purpose is to construct the bridge; for that purpose the two cities may pay a fixed sum, and no more. As no one else may pay, how is more to be paid; and if no more can be paid, how can the work cost more? It can not cost more, until the legislature is again applied to and again gives power to raise and expend money. It is said, that the legislature contemplated a finished bridge. So, indeed, it did. It is argued therefrom, that it meant not to fix a limit to the cost of finishing it. It did not contemplate an unfinished bridge. It looked for a finished bridge, at the expenditure of the sum named, otherwise the proviso of limitation was useless. When, then, it gave the power to the two cities to finish it, and limited the exercise of that power with an expenditure of \$8,000,000, did it not contemplate that the sum would finish and must finish it?—especially when the sum is named, not in the manner of making an annual or recurring appropriation, but as a gross sum to be spread over years of progress in the work, to be called for as needed, and so that waste may not take place by accumulation of idle funds, and from interest on bonds. The legislature never contemplated an unfinished bridge; and yet this will be the result with the law as it now stands. As it contemplated a finished bridge, and forbid further payment to that end than the sum named, it contemplated a bridge finished with that sum.

We cannot speculate upon the future action of the legislature. It may or may not provide for the finishing the bridge, after the \$8,000,000 are expended. This court is to construe the legislative action only as it is. That action will produce only an unfinished structure, which was clearly never intended. It is for the legislature, and not the courts, to determine whether a more expensive structure shall be made. From the language of the act, then, and from the intent

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of the legislature, as gathered from the successive acts upon this subject, I am of the opinion that it was the legislative purpose to fix a limit to the cost of the bridge.

And now to practically apply the result of this discussion.

It is conceded that the contemplated cost of the bridge will exceed, by a considerable sum, the \$8,000,000. So that, if the defendant pay the \$1,000,000 called for, his principal, the city of New York, will not have a completed bridge. And if the views above expressed are correct, it never will have, until the legislature shall be again applied to, and shall give permission to pay more. Is it not, then, the duty of all concerned to stop until that permission be obtained, if it may be? It is contingent whether it will be. While contingent, it seems the part of financial wisdom to put no more money into a work which may be of so much more useless cost. Is it not, then, within the bounds of a just and proper exercise of discretion for the defendant to refuse to issue further bonds of his municipal principal? At any rate, is it not proper for a court to decline to issue its discretionary writ of mandamus to compel him to do that which is, to say the least, of doubtful expediency?

As these considerations have brought me to the conclusion that the mandamus should not have issued, I am for a reversal of the order of the general term and for an affirmance of that of the special term, without passing upon the other serious questions presented by the appellant.

CHURCH, Ch. J., and MILLER, J., concurred.

Order affirmed with costs.

* For other cases, as to what constitutes a *county, city, town, or village purpose*, see *City Council of Montgomery v. Plank Road Co.*, 81 Ala. 76; *Mobile v. Dargan*, 45 *Id.* 810; *Douglas v. Placerville*, 18

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Cal. 643; *People v. San Francisco*, 27 *Id.* 655; *Sweet v. Buffalo, &c. R. R. Co.*, 18 *Hun.* 643; *Bristol v. Chicago*, 21 *Ill.* 605; *Johnson v. County of Stark*, 24 *Id.* 89; *Perkins v. Lewis, Id.* 208; *Township of Burlington v. Beasley*, 94 *U. S. (4 Otto)* 810; *People v. Breslin*, 80 *Ill.* 423; *Burrett v. Brooks*, 21 *Iowa*, 144; *Bell v. Fonch*, 21 *Id.* 119; *Godden v. Crump*, 8 *Leigh (Va.)* 155; *Hauson, appellant*, 51 *Me.* 198; *People v. Salem*, 20 *Mich.* 452; *Chambers v. St. Louis*, 29 *Mo.* 543; *Skinner v. Hutton*, 33 *Id.* 244; *Taylor v. Newberne*, 2 *Jones N. C. Eq.* 141; *Riley v. City of Rochester*, 9 *N. Y. (5 Seld.)* 64; *rev'g* 13 *Barb.* 321; *Philadelphia v. Commonwealth*, 52 *Pa.* 451; *Wheeler v. Philadelphia*, 77 *Id.* 388; *Van Hostrup v. Madison City*, 1 *Wall.* 291; *Rogers v. Burlington*, 3 *Id.* 654; *Mitchell v. Burlington*, 4 *Id.* 270; *Larned v. Burlington, Id.* 275; *State v. Madison*, 7 *Wis.* 688; *Foster v. Kenosha*, 12 *Id.* 616; *Hasbrouck v. City of Milwaukee*, 13 *Id.* 37, 44; *Miller v. Milwaukee*, 14 *Id.* 642; *State v. Haben*, 23 *Id.* 660; *Attor.-Gen. v. Eau Claire*, 37 *Id.* 400; *State v. Supervisors*, 41 *Id.* 28; *Hitchcock v. Galveston*, 2 *Woods*, 272.

For other cases of *excess of authority*, or of the limit of cost in the execution of public works, see *Salem Water Co. v. City of Salem*, 5 *Oreg.* 29; *Baldwin v. City of Oswego*, 1 *Abb. Ct. App.* 62; 9 *Opinions Att.-Gen.* 451; *Ohurch v. Brown*, 29 *Barb.* 385; *Nogues v. Douglas*, 7 *Cal.* 65; *Kingsland v. Mayor, &c. of N. Y.*, 5 *Daly*, 448; *Peoples' Ferry Co. v. Balch*, 8 *Gray (Mass.)* 303; *District Attorney v. County Commissioners*, 14 *Id.* 138; *People v. Northrup*, 15 *How. Pr.* 152; *Latham v. Richards*, 12 *Hun.* 360; *Jackson County v. Hall*, 53 *Ill.* 440; *Condit v. Board of Commissioners*, 25 *Ind.* 422; *Burlington, &c. R. R. Co. v. Boestler*, 14 *Iowa*, 555; *Reichard v. Warren County*, 31 *Id.* 381; *McAuley v. Billenger*, 20 *Johns.* 89; *Pipkin v. Robinson*, 3 *Jones (N. C.)* 152; *Portland, &c. R. R. Co. v. Hartford*, 58 *Me.* 23; *Montague Paper Co. v. Burrows*, 121 *Mass.* 86; *People ex rel. Goodsell v. Post*, 30 *Mich.* 353; *Monet v. Jones*, 18 *Miss. (10 Smed. & M.)* 237; *County of St. Louis v. Cleland*, 4 *Mo.* 84; *Douglas v. Virginia City*, 5 *Nev.* 147; *Virginia, &c. R. R. Co. v. Lyon County*, 6 *Id.* 68; *People v. Fields*, 58 *N. Y.* 491; *Hogan v. Mayor, &c. of N. Y.*, 68 *Id.* 17; *Kensington v. Keith*, 2 *Pa. St.* 218; *Hague v. Philadelphia*, 48 *Id.* 527; *Penn. Township v. Perry County*, 78 *Id.* 457; *Cass v. Pittsburg, &c. R. R. Co.*, 80 *Id.* 31; *United States v. County of Clark*, 96 *U. S. (6 Otto)* 211; *Hitchcock v. Galveston*, 1 *Id.* 341; *Torrey v. Milbury*, 21 *Pick.* 64.

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CONTAINED IN THE FOLLOWING

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